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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING A PART OF

JANUARY TERM, and the whole of JUNE TERM, 1851.

REPORTED BY

J. W. SHEPHERD.

40579

VOL. XIX.

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OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

Hon. E. S. DARGAN, Chief Justice.

Hon. WM. P. CHILTON,
Hon. SILAS PARSONS,*
Hon. DANIEL COLEMAN,*
} Associate Justices.

M. A. BALDWIN, Attorney General.
GEO. C. BALL, Clerk.

---

* Parsons, J., resigned on the 7th June, 1851, and Coleman, J., was appointed by his Excellency, the Governor, to fill the vacancy.

ERRATA.

In Brooks v. Kirby, page 72, E. W. PECK and FRIERSON were of counsel for the plaintiff in error, and P. & J. L. MARTIN for the defendant. FRIERSON's brief was inadvertently inserted *for the defendant*.

In McClung's Ex'rs. v. Spotswood, page 168, bottom line, for "in error" read "*to recover*."

In Turner, Adm'r. v. Dupree's Adm'r., page 198, first line of the opinion, for "*scire facie*" read "*scire facias*."

In Rugeley & Harrison v. Robinson, page 417, fourth line from the bottom, for "assignee" read "*trustee*."

In Stewart George v. Skeates & Co., page 739, second line from the top, for "levies" read "*liens*."

It is unnecessary to notice other typographical errors, which the reader can easily correct for himself, without having his attention specially directed to them.

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REPORTS

OF

CASES ARGUED AND DETERMINED

AT JANUARY TERM, 1851.

TOMLIN *et als. vs.* THE STATE.

1. When an appeal is taken to the Circuit Court from the judgment of a Justice of the Peace by which a party is required to find sureties to keep the peace, the Circuit Court is required to proceed with the examination *de novo*, and may therefore refuse to look to the legal sufficiency of the warrant under which the party was arrested.
2. The Circuit Court may render judgment for costs on the appeal bond, against the securities of a party who has appealed from the order of a Justice of the Peace, requiring him to find sureties to keep the peace.
3. A writ of error does not lie to revise the action of the Circuit Court in cases of appeal from the order of a Justice of the Peace, or other officer, requiring a party to find sureties to keep the peace.

ERROR to the Circuit Court of Talladega. Tried before the Hon. E. Pickens.

J. J. WOODWARD, for plaintiffs in error:

It was necessary that a threat should have been stated in the warrant, without it, the court had no jurisdiction to bind the party to the peace.—40 Eng. Comm. Law, 124.

Even if it could be aided by reference to the affidavit, it is not sufficient.—5 Ala. 130; The Statute, Clay's Dig. 446.

Judgment against the securities on the appeal bond is unauthorized and error. Clay's Dig. 446, and 8 Ala. 731.

THE ATTORNEY GENERAL, *contra:*

1. The demurrer to the warrant cannot be sustained. All that is necessary in a peace warrant is to recite the substance of the complaint.—Clay's Dig. 446, § 4. Besides no objection to the warrant can be taken in the Circuit Court on appeals from justices.—Clay's Dig. 315, § 12.

2. There was abundant proof to confirm the order of the justice.

3. The examination by the Circuit Court, on cases of this kind, must be "*de novo.*" And the court may confirm the order of the justice, discharge the defendant, or require him to enter into a new recognizance, &c., as the court shall think proper. Clay's Dig. §§ 12,13, p. 447.

The whole proceedings are left to the sound discretion of the court; if so, they are not revisable by this court.

4. The matter of cost is discretionary.—Supra, § 12; Dill v. Phillips, 13 Ala. 350.

5. There was no error in entering up judgment against all the recognizors in the appeal bond.—Clay's Dig. *supra*, § 13.

6. This case should be dismissed for the want of proper parties to the record, unless that defect is cured.—Clay's Dig. 315, § 39.

CHILTON, J.—Sherod Tomlin was proceeded against under the provisions of the Penal Code, (Clay's Dig. 445, *et seq.*) which enacts "that when complaint shall be made to any such magistrate, that any person has threatened to commit an offence against the property or person of another, the magistrate shall examine the complaint, and any witness that may be produced on oath, and cause such complaint to be reduced to writing, and subscribed by the party so examined; and if upon examination, it shall appear that there is just cause to fear the commission of any such offence, by the person complained of, it shall be the duty of the magistrate to issue a warrant, under his hand, with or without seal, reciting the substance of the complaint, and requiring the officer to whom it may be directed, forthwith to apprehend the person complained of, and bring him before such magistrate, or some or other magistrate or court having jurisdiction of the matter."

The complaint was made by one Edward Henry, and a war-

rant was issued by the justice, who proceeded to examine into the alleged cause, and determined that Tomlin had been guilty of a breach of the peace, and that he should find surety to keep the peace in the penalty of six hundred dollars, and adjudged him to pay the cost. Thereupon, he took an appeal to the Circuit Court, having entered into bond with his co-plaintiffs in error, George Hill and John Perry, his sureties, as provided by the 11th section of the Penal Code, Clay's Dig. 446, which authorises an appeal to the Circuit Court upon the party entering into bond and security in a penalty equal to that required to enforce an observance of the peace, for the prosecution of his appeal to effect, and in the mean time, to keep the peace. The Circuit Court of Talladega, to which the appeal was taken, proceeded to hear the appeal, and determined that the justice's judgment be in all things affirmed, and awarded cost against the appellant and the sureties upon his bond; to reverse which judgment, the appellant and his sureties prosecute this writ of error.

1. It is insisted by the counsel for the plaintiff in error, that the warrant which the justice issued was fatally defective in not setting forth that a threat had been made, and hence, he concludes the justice had no jurisdiction. The warrant is certainly informal, and if the Circuit Court had been required to try the appeal upon the regularity of the proceedings as shown by the papers certified to it by the justice, the proceedings would doubtless have been quashed; but that court is required to examine into the cause of complaint *de novo*, (Clay's Dig. 447, § 13;) and without deciding that the statute, allowing amendments, extends to cases of this kind, which partake of the nature of criminal proceedings, we think, the statute requiring the Circuit Court to proceed with the examination anew upon the appeal, that court very properly refused to look to the legal sufficiency of the warrant. It was sufficient if, on examination into the cause of complaint, sufficient reason was shown to the appellate court, why the party should be held to find sureties for the peace. The case of the Queen v. Dunn, 12 Adolp. & Ellis, 599, to which we are referred, is wholly unlike the present. In that case the Court of Queen's Bench was called upon to determine the regularity of the proceedings of commitment had in the Court of Quarter Sessions, and they determined that if the exhibitant had set forth in the articles of the peace no threat, the order of the Police Court re-

quiring the defendant to find sureties of the peace, or stand committed, was irregular, and should be superseded. In that case the court proceeded upon the return made to the *habeas corpus* and *certiorari;* in this case, the Circuit Court was required to institute a new examination into the merits, and therefore might well disregard informalities in the proceedings had before the justice of the peace.

2. It is objected in the second place, that the Circuit Court could not properly render judgment upon the appeal bond against the sureties for the cost. The act above referred to provides, that if any party appealing shall fail to support his appeal, his recognizance shall remain in full force and effect, as to any breach of the condition, and shall also stand as security for costs, which shall be ordered by the court appealed to, to be paid by the appellant, &c.—Clay's Dig. 447, § 13. We were at first strongly inclined to the opinion, that the court could not render a summary judgment against the sureties upon such bond for the costs; but upon a careful examination of the statutes, we cannot resist the conclusion that the framers of the Penal Code designed the bond, so far as the cost is concerned, to have the effect of an ordinary appeal bond. The several provisions in respect to the manner in which the appeal shall be prosecuted and determined, and the plain declaration that the bond shall stand as security for the cost, when construed together, we think show very satisfactorily that it was the intention of the framers of the code, that this *quasi* criminal proceeding should be subjected to the ordinary remedies governing appeals in civil cases, except that it is allowed to the court to exercise a more enlarged discretion over the subject of cost; for the Circuit Judge may "make such order in relation to the cost of the prosecution as he may deem just and reasonable."—Clay's Dig. 447, § 12.

What we have said is sufficient to indicate our views as to the correct practice in such cases; and shows that the Circuit Court did not mistake the law. But another question arises, which, according to the view we take of it, might well have superseded all further inquiry. It is, whether a writ of error lies in such cases to revise the proceedings had in the primary court? and upon this point, we entertain no doubt. The statute confers upon all judicial officers, the mayor and aldermen of cities, and the municipal officers of all incorporated towns, the power to compel obedience

to all laws made for the preservation of the public peace, by requiring persons to give security to keep the peace in certain cases pointed out by the act, and in the manner therein prescribed—Clay's Dig. p. 445-6, §§ 3, 4. An appeal, as we have seen, lies to the Circuit Court of the county from the order of such magistrate, but no writ of error is given, and from the nature of the proceeding, and the discretion vested in the primary court which tries the appeal, it is very clear that this court cannot revise its proceedings upon error, any more than the action of the same court in granting a continuance, or in refusing a new trial, or of the Court of Chancery in the matter of decrees awarding costs merely. If the party be improperly in custody upon an application to bind him to find surety to keep the peace, we will not say he has no remedy, we only decide that remedy is not by writ of error. As to reviewing matters of discretion on error—See 13 Ala. 460; 12 ib. 472; 1 ib. 275; 1 Port. Rep. 187.

Writ of error dismissed.

THE STATE *vs.* DAVIS & FERGUSON.

1. A witness who has been examined in behalf of the State on the trial of an indictment against three defendants for grand larceny, to show a common design and confederacy among them, may also testify to the same facts on a subsequent trial of two of the defendants on an indictment for obtaining money under false pretences, from the same person, at a different time and place.

UPON points reserved as novel and difficult, from the City Court of Mobile. Tried before the Hon. Alex. McKinstry.

JAMES DAVIS and George Ferguson were indicted in the City Court of Mobile, for obtaining money under false pretences from one Dr. M. Parker, who was examined on the trial, as a witness for the State. After his examination was finished, the prisoners' counsel moved the court to exclude his testimony from the

jury, for the reason that all of his testimony referring to the offence for which the prisoners were on trial, had been given in evidence by the same witness in behalf of the State, at the trial of the prisoners and one George Williams, (jointly indicted at the same term of the court,) on a charge of grand larceny of other moneys, from the same person, at a different time and place, the said testimony having been used, in connection with other evidence, at the said trial for grand larceny, to show a common design and confederacy on the part of the prisoners and said Williams.

The motion to exclude was overruled, but the point was reserved by the court, and certified to the Supreme Court as novel and difficult.

Attorney General, for the State.

Blocker, *contra.*

PARSONS, J.—The counsel of the prisoners relies upon Rex v. Davis and another, 25 Eng. Comm. L. Rep. 341, to show that the evidence should have been excluded. But that case does not show that it should have been excluded as matter of legal right, and we certainly can not go that length. The two indictments were for different and distinct crimes; and in the other case these prisoners were indicted and tried jointly with another person. The evidence of the crime in this case was not given on the trial of that, to prove the crime, but only to connect the parties in a common design and confederacy. These prisoners were not convicted of this crime upon that indictment, though the evidence of this crime may have contributed to connect the parties in the commission of that. Whether for such a purpose it was admissible, was a question to be settled in that case, but not in this. This is the only question which the court below referred to this court.

The judgment is affirmed.

THE STATE *vs.* WILLIAMS, *et als.*

1. An indictment for larceny of "Bank notes," *eo nomine*, which states their number, denomination and value, is sufficient.

Upon points reserved as novel and difficult, from the City Court of Mobile. Tried before the Hon. Alex. McKinstry.

George Willims, James Davis and George Ferguson were jointly indicted in the City Court of Mobile, for grand larceny. The indictment charged them with having stolen from the person of one Doctor M. Parker a certain purse, whose value was stated, and certain "Bank notes" *eo nomine*, the number denomination and value of which were stated. A motion was made to quash the indictment, which was overruled. The defendants on the trial were all found guilty, and afterwards moved in arrest of judgment on the following grounds. 1st. Because of the insufficient description of the bank notes in the indictment. 2d, Because the indictment does not aver that the bank notes are the notes of an incorporated bank. 3rd. Because the indictment does not aver that the bank notes were a valuable contract in force at the time of the alleged larceny. 4th. Because the indictment does not aver that the bank notes were of value due and unpaid to the holder at the time of the alleged larceny.

The motion was overruled, but the questions being in the opinion of the court novel and difficult, were reserved and certified to the Supreme Court.

Attorney General, for the State:

1. Bank notes are the subject of larceny, *eo nomine*.—(Clay's Dig. 425, § 57,) and no further description of them is necessary in the indictment.—Com. v. Richards, 1 Mass. 337; Green, v. State, 5 How. Miss. 33; People v. Kent, 1 Douglass, 42; State v. Cassell, 2 Harris & Gill. 407; Pomroy v. State, 2 Virg. Cas. 342; Johnson's case, 2 Russ on Cri. 170.

2. This is an indictment for larceny from the person (Clay's Dig. 425 § 56,) and in addition to bank notes, the prisoners are charged with the larceny of a purse of the value of one dollar. Proof of one of the articles stolen would bring the offence within the statute.—Swinney v. The State, 8 Smedes & M. 576.

BLOCKER, *contra:*

The motion should have prevailed. Certainty to a reasonable intent, so as fairly to inform the party charged, so as to prepare for his defence, is a pre-requisite in all indictments.

"Bank notes" is an indefinite term, uncertain in the limitation, and can be made to extend to any paper bills in an engraved or printed form; it was the meaning and intention of the Legislature, that the offence should consist in the larceny of the note or notes authorised by law to be issued by any banking institution, the law alone fixes the value, by giving the authority to issue them; therefore, it became necessary to aver, that the notes subject of the larceny, were the notes of an incorporated bank.—Clay's Dig. 435-6-25.

The motion should have been sustained, and the indictment quashed, for want of the averment of the material requisite contained in the statute, that the bank notes at the time of the larceny charged, "were a valuable contract in force."—Clay's Dig. 425.

The motion should have been sustained, and the indictment quashed, because there is no averment that the sum mentioned in the bank notes was due and unsatisfied, between the prosecutor and the bank, at the time of the supposed larceny.—1 McCord's Rep. 528; 6 Johns. Rep. 103; 1 Binney 273; 3 Binney 533; 1 Brown 360; 11 Mass. Rep. 279.

CHILTON, J.—The motion to quash this indictment, as also to arrest the judgment, was properly overruled. Waiving the consideration of the question, whether, inasmuch as the indictment charges a larceny from the person of a certain purse of the value of one dollar, this would not, under the general finding of the jury, support the judgment of the court, we are quite sure that the indictment sufficiently avers the larceny of the bank notes. The number, denomination and value of the notes are stated, and the indictment describes them as "bank notes." In this it conforms to the statute, which enacts that "every person who shall commit the offence of larceny, by stealing any goods or chattels, or any bank note, bond," &c. It seems to be well settled by cases arising under similar statutes, that it is sufficient to charge the stealing of bank notes *eo nomine.* See the cases cited on the brief of the Attorney General. It was for-

merly the practice in indictments for stealing notes, &c., to set them out at full length (3 M. & S. 541; 2 Russ. 170,) but it has long been settled, that this particularity is unnecessary, and that it is sufficient if the indictment follow the descriptions of the property stolen as given in the statute.—2 Russ. 186, (top page 3d Ed.) and cases cited.

In Rex v. Johnson, 3 M. & S. 539, Lord Ellenborough, C. J. said he considered that after the statute had made bank notes the subject of larceny, they might be described in the same manner as other things that have an intrinsic value; that is, by any description applicable to them as a chattel.

Le Blanc, J., in the same case, replying to an objection similar to that urged by the counsel for the prisoner in the case before us, said "The argument upon this part of the case has arisen from the practice that has prevailed, of describing the particular sum for which the note is payable, and that the money secured thereby is unsatisfied. But the answer to such an argument is this, that whether it be payable for one sum, or for another, it is equally a bank note, and a bank note is the subject of larceny. Therefore, it is not a good objection, that the bank note is not sufficiently set out." These remarks are cited with approval by Mr. Russell, (2 R.187,) and are so apposite to the case before us, that we deem any further comment unnecessary. See the cases cited in the United States v. Moulton, 5 Mason's C. C. Rep. 537, and Greeson v. The State, 5 How. (Miss.) Rep. 30-38. These authorities conclusively show that the court below did not mistake the law in the points referred to this court as novel and difficult, and as there is no writ of error in the case, we cannot look into the bill of exceptions.

Let the judgment be affirmed.

COBB *vs.* THE STATE.

1. When the record contains no bill of exceptions, but only an agreement purporting to have been made between the Solicitor and the counsel for the defendant, that the bill of exceptions taken in another case should be regarded as having been taken in the case at bar, and the minute entry does not show that the agreement was acknowledged by the parties in the Circuit Court, or made part of the record by an order of that court, the appellate court will reject the agreement.

ERROR to the Circuit Court of St. Clair.

PARSONS, J.—There was no bill of exceptions in this case, but we find in the transcript what purports to be an agreement between the Solicitor of the circuit where the trial was had and the counsel for several defendants in different cases of gaming, one of whom is named in the margin as W. H. Cobb, and it purports to have been agreed that the bill of exceptions taken in a case at the same term against one Gill, should be regarded as having been taken in each of the other cases, and so apply. The paper purporting to be an agreement, signed by the parties, is copied into the transcript as part of the record. But, independent of the absence of any minute entry to show that it was acknowledged by the parties in the Circuit Court and by order of that court made a part of the record, it may be discovered from the certificate of the clerk, though a little ambiguous, that it was not a part of the record. We unhesitatingly reject it. The judgment is affirmed.

HURT *vs.* THE STATE.

1. A verbal permission from the owner of a slave to sell "*dry goods*" to the slave, is too general and indefinite. The permission, whether verbal or in writing, should specify the article to be sold.

(DARGAN, C. J., *dissenting*, held that the term "*dry goods*" was sufficiently definite.

ERROR to the Circuit Court of Perry. Tried before the Hon. Geo. D. Shortridge.

A. B. MOORE, for plaintiff in error.

ATTORNEY GENERAL, for the State.

PARSONS, J.—Mr. Hurt was convicted on an indictment for selling a pair of shoes to a slave. On the trial he admitted the sale, and that he received payment from the slave. But he then proved by the owner of the slave that, two months before the time of the sale, he gave to Mr. Hurt verbal permission to sell dry goods, at any time, to the same slave, provided he made him pay the money for them, but prohibited a sale of ardent spirits. The court charged, in substance, that the particular articles to be sold to the slave must be expressed in the permission; and if not so specified, the jury should find against Mr. Hurt, and he excepted. The act is, that "Every person who shall buy, sell or receive from any slave, any commodity, of any kind or description, without the leave or consent of the master, owner or overseer of such slave, verbally or in writing, expressing the articles permitted to be sold or bartered, first obtained, shall, on conviction, be fined," &c.—Clay's Dig., 437, § 8. The permission was general to sell dry goods.

Most owners, I believe, allow to their slaves reasonable time to make provision for the comfort of themselves and families, and, to that end, permit them to deal with honest white persons, so far as to sell their commodities, or to expend their money, in the purchase of necessaries. And it is very true, as argued by Mr. Hurt's counsel, that it is quite an inconvenience to the owner and some privation to the slave, if he must mention every article in the permission, though various articles might be required; and,

indeed, the negro might not very well know what he would prefer, until he gets to the store or market where he wishes to purchase his supplies.

But the language of the act is plain, and it requires that the articles should be expressed: And if a permission so general as "dry goods," is a compliance with the act, it is difficult to imagine what other words or phrases could be too indefinite. In requiring the articles to be specifically stated, we think the Legislature designed to suppress, and that it adopted a very proper mode of suppressing, a general evil in some parts of the country, growing out of a clandestine traffic between slaves and a particular class of white persons. It was intended that the owner might authorise his negro to buy such articles as he should express in the authority, so that the negro should have the privilege of making himself and family comfortable and even respectable in his caste, but not to dispense with the owner's discretion in this object altogether. For if a negro may buy all sorts of dry goods from a man having and meriting, as Mr. Hurt very probably did, his owner's confidence, he might soon acquire goods enough to become a pedlar among other negroes and the class of white men, whose conduct led to the passage of the act, and thus, it is obvious, the spirit and language of the act, express and plain as it is, would be violated. That Mr. Hurt had no bad motive and intended no violation of the act, is very clear. But, on the other hand, his act itself was a violation of the law, and it is not contended that we can admit his misunderstanding of the law as an excuse for the offence. Such an excuse, if generally admitted, would annul the criminal code and shake the foundations of society.

Let the judgment be affirmed.

DARGAN, C. J.—I cannot concur in the opinion of the court delivered in this case. I think the term, dry goods, sufficiently descriptive of the article or commodity permitted to be sold. I therefore would hold, that if the defendant sold the shoes to the slave under the permission from his master, *to sell him dry goods*, that the defendant has not violated the statute.

TREXLER *vs.* THE STATE.

1. An indictment for an assault with intent to murder. must state the facts which constitute the assault.

ERROR to the Circuit Court of Chambers. Tried before the Hon. E. Pickens.

RICE, for the plaintiff in error.

1. An indictment for assault with intent to murder, does not charge a felony, unless it alleges the means of the assault.—Beasley v. The State, Jan. Term, 1851.

2. But although, such indictment cannot be held good for felony, yet a demurrer to it could not be sustained, if, as in this case, it clearly charges an assault; and the proper judgment on a verdict under such indictment, finding the defendant "guilty as charged," is for a misdemeanor (to-wit: an assault.)—The State v. Burns, 8 Ala. Rep. 313; Nancy v. The State, 6 Ala. Rep. 483; Nabors v. The State, 6 Ala. Rep. 314; The State v. Stephen, 15 Ala. Rep. 534.

3. Such verdict cannot, and does not, find any more than is legally charged in the indictment, but it does find that much, and the court is bound to render the judgment of law upon the finding.

4. Although by the common law a judgment for a misdemeanor might not in all cases be rendered on an indictment for a felony, when the verdict only found a misdemeanor, yet our penal code requires this to be done.—Clay's Dig. 442, § 26; Ib. 439, § 12; Ib. 441, § 23.

5. The omission to assess a fine does not vitiate the verdict. If it be necessary to assess a fine, it may be assessed hereafter. Boyd v. Gilchrist, 15 Ala. R. 856.

6. The omission to assess the fine does not vitiate the verdict, because it does ascertain the guilt the defendant of an offence; and the court may enter judgment on it.—State v. Nancy, 6 Ala.

ATTORNEY GENERAL, for the State:

It is conceded that this case must be reversed on the authority of the case of the State v. Beasley, at this term. But it is con-

tended for the defence, that as there is a good count in the indictment for an assault and battery, the verdict is presumed to be upon that count, and that the court below should have passed sentence on the count; and, as the Circuit Court refused to pass sentence on that count, this court must reverse the case in part only, and send it back for the court below, to render the proper sentence on the assault and battery.

1. The verdict was, "we the jury find the defendant guilty as charged," clearly meaning, of an assault with intent to murder. No fine of course was assessed. If the finding of the jury was for an assault and battery, they should have assessed the fine.—Clay's Dig. 441, § 21. As they did not, the verdict is imperfect and void, and no sentence can be passed by the court, and the case must be reversed *in toto*.

2. When a judgment in a criminal case is entire, and a writ of error is brought to reverse it, where it is erroneous in part only, it must be wholly reversed.—Christain v. Com. 5 Met. 530; Sheppard v. Com. 2 Ib. 419; Stephens v. Com. 4 Ib. 371; State v. Anderson, 1 Strob. 455.

DARGAN, C. J.—In the case of Beasley vs. The State decided at the present term, we held that in an indictment for an assault with the intent to murder, the facts constituting the assault must be alleged, and if they are not, the indictment is defective. But if the facts constituting the assault are stated, and then it is averred that the assault was committed with the intent to murder, the indictment would be good under the statute.—Clay's Dig. 442, § 26. Applying the rule recognized by this decision, we are bound to hold the indictment in this case defective. It merely avers the assault with the intent to murder, without setting out the facts which constituted the assault.

The judgment must therefore be reversed, and the cause remanded, and the prisoner will be retained in custody, that he may be re-indicted, unless discharged by due cause of law.

DE BERNIE *vs.* THE STATE.

1. In an indictment for perjury, which charges the defendant with having taken a false oath to procure his discharge from custody under a writ of *ca. sa*, an assignment which alleges that at the time when he took the oath, he had moneys whereby to satisfy the debt for which he was arrested, is sufficient.
2. An indictment for perjury is not vitiated because some of the assignments are bad, and proof of any one assignment that is good is sufficient.
3. The penalty of perjury as prescribed by the Act of 1839, (Clay's Dig., p. 71, § 4,) is changed by the subsequent Act of 1841, (Clay's Dig., p. 427, § 2.)

ERROR to the Circuit Court of Jefferson. Tried before the Hon. Geo. D. Shortridge.

THE defendant below was indicted for perjury. The indictment alleged that he was in the custody of a lawful officer under a writ of *ca. sa.*, at the suit of one B. B. Patton; that he appeared before the justice of the peace who had issued the writ, and produced an affidavit in writing, and was in due form of law sworn and took his corporal oath concerning the truth of the matters contained therein; and that he "falsely, corruptly, knowingly, wilfully and maliciously, in and by his said affidavit in writing, did depose and swear in substance and to the effect following, that is to say: that the particular grounds upon which he was then arrested in that cause were untrue, and that he had neither estate, effects or moneys whereby to satisfy the debt for which he was arrested, or liable for the same, except one guitar," &c. The first assignment of perjury alleged, that at the said time when he took his oath and made his said affidavit, "the said defendant had moneys and effects, other, above and beyond the said guitar, whereby to satisfy the said debt for which he was arrested," &c. The second assignment alleged, that at the said time, &c., "the particular ground upon which the said defendant was then and there arrested, was true."

The third assignment alleged, that at the said time &c., "the said defendant had effects other than the said guitar, whereby to satisfy said debt," &c.

The fourth assignment alleged, that at the said time &c., "the said defendant had moneys whereby to satisfy said debt," &c. The defendant was convicted and sentenced to *three* years imprisonment in the penitentiary.

E. W. Peck, for plaintiff in error:

In this case the court will look to the whole record, and if the indictment be bad, will reverse the conviction.

Then, I insist, the indictment is bad. The assignment of perjury is not well made. It does not state that the effects, or money, were fraudulently withheld, or that they were in truth and in fact liable for the satisfaction of the debt for which he was arrested.

The first assignment is, that he "had money and effects other, above, and beyond the said guitar, whereby to satisfy the said debt," but it does not say that they were liable for that purpose. The effects may have been exempt from execution, and the money may have been held as trustee, executor or administrator, and which he could not have devoted to the payment of the debt without a breach of trust.

The second assignment is altogether too general, and by itself is insufficient to sustain the indictment.

The third and fourth are liable to the same objections taken to the first; they do not state that the effects were liable to the execution, or that the money was fraudulently withheld.—2 Ch. Crim. Law, (top p.) 311; Cook's Case, 1 Rob. Va. R. 729; U. S. v. Chapman, 3 McL. R. 390; 1 vol. U. States Dig. Annual, 396, §§ 2, 1. In an indictment nothing can be taken by intendment.—The State v. Seay, 3 Stew. 123.

PARSONS, J.—I have attentively considered all the objections urged by the counsel against the indictment and proceedings in this cause. The only difficulty was in reference to the assignments of perjury, and to these the argument of the counsel was chiefly directed. I think some of the assignments are defective; but there is one which we think is good. It states that the plaintiff in error, at the time he took the oath, had moneys whereby to satisfy the debt for which he was arrested. An assignment of perjury consists of an express contradiction of the party's statement on oath, as explained by inuendoes.

2 Chitty's Crim. Law, 311; 1 T. R. 70. This averment, we think, is sufficiently specific and distinct, and it manifestly negatives the oath which the indictment alleges he falsely, &c. swore. It appears by the authorities collected by Mr. Chitty, at the page already cited, that an indictment is not vitiated, because some of the assignments are bad, and proof of any one that is good is sufficient. We are entirely satisfied that the penalty of perjury as prescribed by the act of 1839 (Clay's Dig. 71, § 4,) is changed by the subsequent act.

The judgment is affirmed.

WEEKS *vs.* LOVE, Adm'r.

1. An administrator who has paid money through mistake, to the administrator *de bonis non* who succeeds him, cannot recover it in assumpsit from a successive administrator *de bonis non*.

Error to the Circuit Court of Pike county. Tried before the Hon. Robert Dougherty.

Sayre, for the plaintiff in error:

1. When money is paid under a mistake of fact or false representation, it may be recovered back.—Martin v. Morgan, 5 Eng. Com. Law, Rep. 87.

2. Money paid under a mutual mistake of facts, there being no fraud, may be recovered back.—1 Sup. U. S. Dig. 192.

3. When an administrator of an insolvent estate has overpaid a debt, he may recover it back in assumpsit.—Ib.

4. And it may be recovered back from the administrator *de bonis non*, when passed to the estate as assets.—Houston v. Frazer, 8 Ala. 81; Sellers v. Smith, 11 Ala. 264.

Buford, for the defendant:

1. The first three propositions above are admitted; the fourth is not sustained by the cases referred to, but they go rather to

show that the action should have been against Love, in his individual, and not in his representative capacity; or rather should have been against John & Mary McBeth, who received the money.

2. It does not appear from the bill of exceptions, that the overplus paid by Weeks to McBeth was turned over to defendant with the assets; and must be intended to be still in McBeth's hands.

3. In Williamson v. Howell, *et al.* 4 Ala. 693, the court held that even the surety of the administrator had not the right to have his principal's mistake (in a settlement of the estate) corrected in the absence of fraud; so here, if the mistake was in the settlement (and as to that, the bill of exceptions is silent) in the absence of fraud it cannot be corrected. But if the mistake (as perhaps was the case) consisted in paying over more than was found to be due them, it is not assets, but it is in the hands of John & Mary McBeth, and they are individually liable.

4. It does not appear from the bill of exceptions, that the overplus paid by plaintiff ever was applied either by McBeth or this defendant to the use of the estate; if the estate never received the money, the estate is not liable.

CHILTON, J.—This was an action brought by the plaintiff in error against the defendant, as administrator of the estate of Walter McBeth, to recover money, which the plaintiff, as administrator in chief of the same estate, had paid by mistake to John C. & Mary McBeth, who succeeded him in the administration. It appeared that John C. & Mary had quit the administration, and had turned over the assets of the estate to the defendant, who was administrator *de bonis non*, by virtue of his office, as sheriff of the county. The bill of exceptions does not state that the money thus paid by the plaintiff through mistake to the intervening representatives, was treated by them as assets, or paid over by them to the defendant, who succeeded them; but only shows that the assets of the estate passed into the defendant's hands. The court charged the jury, that upon this proof the plaintiff could not recover.

In our opinion, this charge was correct; for it is very clear that the money overpaid through mistake was not an asset of the estate, and that the estate could not be made chargeable on

account of its receipt by the administrator *de bonis non*, but the party who has it in possession has money which, *ex æquo et bono*, belongs to the party, who, through mistake, has paid it, and is liable, not as administrator, but in his individual capacity, to refund it to the plaintiff. The cases of Houston v. Frazer, 8 Ala. Rep. 81; and Sellers v. Smith, 11 ib. 264; furnish a sufficient guide as to the manner in which a recovery may be had. It is very certain, that if the defendant has only received the assets proper belonging to the estate (and the bill of exceptions certifies to us, that he has only received such) he cannot be charged by reason of their receipt for moneys, which a previous administrator of the same estate has improperly received, and which do not belong to the estate. It is too well settled to require the citation of authority, that an administrator cannot by any act of his create a right of action against the estate he represents, however he may subject himself to personal liability. If he enter into a contract, or give a note, as administrator, the estate is not bound, but himself individually, upon such contract or promise.

Let the judgment be affirmed.

GRIFFIN, RAYFIELD & GRIFFIN *vs.* WILSON.

1. If a writ issue against three defendants, which is served upon two of them only, and an *alias* is issued and served upon all, it is erroneous to render judgment by default against all of them, at the term to which the *alias* writ is returnable.
2. In such case, a writ of error is properly sued out in the name of all the defendants, and all may join in the assignment of errors.

ERROR to the Circuit Court of Talladega.

WOODWARD, for the plaintiff in error:

The return of the sheriff on the first writ shows that David A. Griffin was not served. The return of the *alias* shows that D. A. Griffin was not served with process until the 2d of September,

1850; consequently but one term of the court has intervened since such service, and it was error to render judgment against him at the appearance term, by default.—Clay's Dig. 334, § 115.

The plaintiff must have judgment against all the defendants, or none. A judgment against two would be a discontinuance as to the whole action.—5 Ala. 183.

Writ of error shows when judgment was rendered.

RICE & MORGAN, *contra:*

1. The judgment was not rendered at "the appearance term," and is entirely correct.

2. James Griffin and M. Rayfield were served before Spring Term, 1850, and that was the appearance term. The judgment was not rendered until Fall Term, 1850, nor until all the defendants were served.

3. The assignment of errors is joint. And as there is certainly no error as to James Griffin and Rayfield, the fact that they join with David Griffin in the assignment of errors, makes the assignment of errors bad. This is so, upon the principle that a declaration at the suit of three plaintiffs is bad as to all, if it is bad as to two; and also upon the principle, that a joint plea by three defendants is bad as to all, if it is bad as to two.

CHILTON, J.—By the act of 1839, (Clay's Dig. 334, § 115,) it is enacted, that "in all suits instituted in any court having jurisdiction thereof, for the purpose of collecting money, no judgment shall be rendered at the appearance term, except by the consent of parties, from the failure of the defendant or defendants to plead or enter appearance, as now by law required." The writ in the case before us was executed on James Griffin and Moulton Rayfield, but was returned to the first term of the court, "not found," as to David A. Griffin. Is was then permissible for the plaintiff to have discontinued as against the party not found, and to have declared against the defendants on whom the writ was executed. He did not, however, elect to do this, but sued out an *alias* writ against all the defendants, which was duly executed, and the plaintiff took judgment by default against all the defendants at the term of the court to which the writ was made returnable. This was clearly in violation of the statute above stated, and erroneous.

There is no force in the objection, that the plaintiffs in error unite in their assignments of error, and that the judgment having been rendered at the proper term as to two of them, should, upon their joint assignment, be affirmed as to all; for, as they were all served with process, a discontinuance as to one of them before any defence personal to himself was pleaded, would have amounted to a discontinuance of the entire action.—Adkins v. Allen, 1 Stew. 130; Keebles v. Ford & Vining, 5 Ala. 183.

Let the judgment be reversed and the cause remanded.

DENNIS & STRICKLAND *vs.* CHAPMAN, Gov'r. &c.

1. A witness who deposes to the declaration or admissions of a party, must give the precise language used by him, if he can, or at least the substance of what he said.
2. The admissions of an officer are not evidence against his securities, unless they are made while in the performance of some official act or duty, connected with the transaction, out of which the breach of the condition of his bond is alleged to have arisen.
3. A constable who has levied executions on personal property, while they are in force, may sell after the return day of the writs; and his receipt of the money upon a sale, and failure to pay it over according to law, will subject his securities to liability therefor.

Error to the Circuit Court of Randolph. Tried before the Hon. John J. Woodward.

This was an action of covenant brought in the name of the Governor for the use of Culbreath, against the securities of a constable, on his official bond. The constable had levied two executions in his hands on a slave, and sold her after the return day of the executions. The slave brought more than enough to satisfy the executions, and this action is brought by the defendant in the executions to recover the residue.

It appears from the bill of exceptions, that the defendants in

the court below introduced one Hunter, as a witness, and offered to prove by him, "that about the time he served the notices on the defendants in this suit, he had a conversation with the plaintiff, and his recollection was, that his understanding from said conversation was, that the matter was pretty well arranged." This evidence was objected to by the plaintiff, and excluded by the court, to which the defendants excepted.

The plaintiff offered to prove by one Cunningham, "that he had a conversation with the constable some time after his removal from office, while on his way to California," in which "the constable told witness, that the defendants had been writing to him about this matter; that it could not hurt them, as no money could be made out of them by legal process, and that when he returned from California, he would pay the debt, and relieve them from all liability." The defendants objected to this evidence, but the court permitted it to go to the jury, to which the defendants excepted. This is all the evidence set out in the bill of exceptions, which relates to the points decided by the Supreme Court.

Hudson, for the plaintiff in error:

The return day of the executions arrived before the day of sale, and to have made the plaintiffs liable, the constable should have had process in force at the time of sale.—13 Ala. 526.

The fact that there was no proof that these (defendants) plaintiffs had paid any money, does not exclude the idea that money had been paid by their principals, but such seems to be the fact from the rebutting testimony of the witness, Cunningham.

The testimony of Hunter should have gone to the jury, and the court asked to charge as to its effect.

The testimony of Cunningham should not have been permitted to go to the jury. The declarations of Smith, after he had gone out of office, could not be given in evidence against his sureties. 4 Ala. 611.

Heflin, for defendant:

1. A sheriff may lawfully sell personal property which has been levied upon by him, by an execution of force at the time of the levy, after the return day of the writ.—Neal *et al. vs.* Caldwell, 3 Stewart, 134.

2. The effect of a levy on personal property, regularly made, is to divest the title to the thing out of the defendant in execution, and vest it in the officer making the levy, who holds it for the benefit of the creditor, and is regarded by the law as the authorised agent to make the sale, which he may do in virtue of the levy, notwithstanding the writ is made returnable before the sale is actually made.—Bondurant *et al. v.* Buford, 1 Ala. 359.

3. The declarations of Smith as proven by the witness Cunningham, were properly admitted, the declarant Smith having a joint interest with the defendants, and even more, as he was liable to refund to them what they might pay as sureties in office for him, and the admission being against his as well as their interest.—1 Phillips Ev. 75; Howard v. Cobb, 3 Day's R. 309.

DARGAN, C. J.—This was an action of covenant brought against the securities of a constable under the following circumstances. The constable sold a slave belonging to the plaintiff, to satisfy executions he had against him; the slave brought more than enough to satisfy the debts, and the plaintiff demanded the surplus remaining in his hands, but the constable failed to pay it over; several objections were taken to the ruling of the court, which we will notice in the order they are presented by the assessment of errors.

1. The demurrer to the declaration was correctly overruled; the declaration is framed with care, and is entirely good.

2. The declarations and admissions of a party against his interest are admissible as evidence against him; but the witness who deposes to such declaration or admissions should give the precise language of the party, if he can; if he cannot, he should be able to state the substance of them. If he cannot undertake to testify to the language, nor to the substance of the admissions, he ought not to be allowed to depose. Tested by this rule, we do not think the court erred in rejecting the evidence of Hunter. He did not propose to state the language, nor the substance of the admission, but merely his understanding of the admissions. If he had stated the admissions made, either in the language of the plaintiff, or the substance of them, the jury might have understood them differently from the witness.

3. But it is very clear that the court erred in permitting the admissions of the constable, made after he went out of office, and

when he was not in the performance of any duty growing out of his office, and connected with this transaction, to go to the jury as evidence to charge his securities. To make the admission of an officer evidence against his securities, they must be made in the performance of some official act or duty connected with the transaction out of which the breach of the condition of the bond is alleged to have arisen, and if they are made at a time when he is performing no official act or duty required of him, they are inadmissible to charge his securities.—Evans v. State Bank, 13 Ala. 787, and cases there cited.

Another question has been raised on the brief of the counsel for the plaintiff in error, which is, that the constable having sold the slave after the return day of the execution, his securities are not liable for the money, notwithstanding the levy was made whilst the execution was in full force, and by virtue of which he had the slave in possession. Although this question is not raised by the assignment of errors, we deem it proper in this case to say, that the case of the Governor use &c. v. Chandler's securities, decided at the present term, shows that the defendants under these circumstances, would be liable for the money received by the constable upon the sale of the slave, and that the receipt of the money was within the official duties of the constable, and therefore covered by his bond.

For the error we have pointed out, the judgment must be reversed, and the cause remanded.

KIRKMAN & ROSSER *vs.* PATTON.

1. If an attachment be issued without the bond and affidavit required by the statute, it can only be abated on the plea of the defendant.
2. Until abated, it is valid, and its levy on the property of the defendant creates a lien, which cannot be displaced, or held for naught, merely by showing such irregularities in the process, as would have entitled the defendant in the writ to abate it on plea.

ERROR to the Chancery Court of Lauderdale. Tried before the Hon. D. G. Ligon.

ORMOND, for the plaintiffs in error.

L. P. WALKER, and WATTS & JACKSON, *contra.*

DARGAN, C. J.—The bill shows that several attachments were issued in favor of Kirkman, against Samuel Bromly, returnable to the Circuit Court of Lauderdale: That Robert M. Patton also issued an attachment against Bromly, returnable to the same term, but his attachment was levied before the attachments of Kirkman. At the appearance term, Bromly filed a plea in abatement to the writ of Patton, on the ground that it was issued without the affidavit and bond required by the statute; but an affidavit and bond afterwards appearing on file, the plea was withdrawn and judgment rendered in favor of Patton. The bill further alleges, that the affidavit which was produced was not made until some time after the writ had been issued, but that it was ante-dated so as to appear to have been made according to the requirements of the statute, which was a fraud upon the complainants, and enabled Patton to obtain priority over them in the application of the funds arising from the sale of the property. The prayer of the bill is, that the lien of the complainants be decreed to be prior to that of the defendant, Patton, and that the money be first applied to the satisfaction of their debt.

From the answer and evidence, we think these facts are established: that the bond was executed before the writ was issued, and that Patton was orally sworn to the facts set out in the affidavit, but that the affidavit was not reduced to writing until after the writ was issued and had been levied.

But, without regard to the questions arising upon the answer and proof, I am clearly of the opinion that the bill was properly dismissed, for the reason that it does not contain equity. If an attachment be issued without the affidavit and bond required by the statue, the writ can only be abated by plea of the defendant. Clay's Dig. 55; Jones v. Pope, 6 Ala. 154. Until abated, the writ is valid, and its levy on the property of the defendant creates a lien that cannot be displaced or held for naught merely by showing such irregularities in the process as would have entitled

the defendant in the writ to abate it on plea. If any such irregularity did exist in the issuance of the attachment of Patton, Bromly, the defendant, took no advantage of it, but suffered judgment to be rendered against him. This perfected the lien created by the levy, and as the judgment itself is not controverted, the lien cannot be, for the writ is not void, but could only have been abated by the plea of Bromly.

The decree of the chancellor, dismissing the bill, must be affirmed.

ALLEN, Adm'r, *vs.* GREENE.

1. When no time is limited for the performance of a covenant, it must be done *within a reasonable time.* Therefore, when the obligors in a bond for title bound themselves to make title to the obligee, which the bond showed was in a third person, and the obligee lived more than three years after the execution of the bond, during which time the obligors did not enable themselves to comply with the condition of their bond, and made no effort to procure the title, it is *prima facie* a breach of the condition of the bond in the life-time of the obligee, for which his administrator is the proper party to bring suit.
2. When the bond shows that the title is in a third person, and the obligor never procures a conveyance of the title to the obligee, nor obtains it himself, the heir of the obligee cannot take the land by descent, nor sue in his own name for a breach of the condition, whether that breach happened before or after the death of his ancestor.
3. If the obligee has not violated the contract on his part, an action may be maintained by his administrator, for a breach, although the purchase money may not have been paid.
4. But if the obligee is notified by the surety of the principal obligor, that the title is not in the person named in the condition of the bond, and promises such surety, on his request, not to pay the purchase money until the title is arranged, but afterwards, in violation of his promise, pays it, when he could, consistently with his contract, have retained it, the surety, in a suit on the bond, can reduce the damages to the extent of the purchase money.

ERROR to the Circuit Court of Benton. Tried before the Hon. Thomas A. Walker.

WHITE & PARSONS, for plaintiff:

Contract is to be construed most strongly against party giving instrument.—Pitman on Prin. & Sur. 38, (mar. 27,) 30 L. Lib.; Platt on Cor., 3 ib. 63.

The legal effect of the bond is an obligation to obtain titles and make them to plaintiff's intestate, in a reasonable time, and the three years which elapsed upon the death of intestate was more than a reasonable time.—Garnett v. Yoe, 16 Ala. 74; Platt on Cor. 145; 3 L. Lib. 65.

The bond was an independent covenant, and the right of action did not depend upon the performance of the contract by the plaintiff's intestate, nor was it necessary to tender deed or demand title.—Williams v. Harper, 1 Ala. 502; Fitzpatrick v. Hanrick, 11 ib. 785.

Where vendor has no title at the time when he is to convey, this of itself is a breach of the bond, and it is not necessary for vendee to prepare and tender deed.—Johnson v. Collins, 17 Ala. 327; Blam v. Smith, 4 Blackf. 517; Williams v. Casey, 4 Bibb, 300.

Administrator is entitled to sue for breach in the life-time of the intestate.—Brown v. Chamberlain, 12 Ala. 711; Abney v. Brownlee, 2 Bibb, 170; Hatcher v. Galloway's Ex'r, ib. 180; Rockingham v. Penrice, 1 P. Wms. 177.

The bond is payable to intestate, without naming his heirs, and a recovery at law must be in money; and as it is not a covenant running with the land, it would be assets in the hands of the administrator, and he may recover for a breach after the death of his intestate.—Leber v. Kauffelt, 5 W. & Ser. 440.

It does not appear whether the purchase money was paid at the time, or before the bond was given, or whether it was to be paid afterwards, nor is it material. The covenant to make titles was independent, and the bond gave a right to entry, and intestate did enter upon the land, and in such case he could not resist the payment of the purchase money.—Reed v. Davis, 4 Ala. 83.

The law required of Bruton that he should pay. Green, the security, told him not to pay, and it is now urged that because

Bruton did not refuse to pay, that the law will deprive him of his remedy for a failure to make him titles.

Bruton possibly might have rescinded the contract if he had chosen so to do, but he had the right to rely upon and enforce the contract, either in law or in equity, if he thought proper to do so; and so long as he regarded the contract as of force, he was bound on his part to perform it, not as a condition precedent to his right of action against the obligors in the bond, but as a part of the contract.

It was not necessary that the intestate of the plaintiff should abandon the land before he could recover on the bond.—Pinkston v. Huie, 9 Ala. 252; Haynes v. Farly, 4 Por. 528.

In construing bond, the court will look to the intention of the parties, and the condition of the bond ought to be so construed as to carry out that intention.—Whitsett v. Womack, 8 Ala. 481; Watts v. Sheppard, 2 Ala. 425.

The principal question in the case grows out of the charge of the court, which being affirmative, if erroneous, must reverse the case.—Haggerty v. Bradford, 9 Ala. 571; Pinkston & Wife v. Green & Wife, 9 ib. 19; Jackson v. Gwin, ib. 114.

There was no evidence to show that Green was the security of Chilton, nor could such evidence legally have been adduced. It would have been to contradict the face of the bond, by which both Chilton and Green were to make a deed to Bruton.—See cases cited, B'k Mobile v. Darrington, 9 Ala. 954. Here the contract is absolutely joint, and a deed by one would be no compliance.—4 Shep. 164.

Green had no right to demand of the plaintiff's intestate that he should not pay the purchase money, nor had intestate any power to resist payment. A promise not to do so was nugatory. It imposed no obligation upon Bruton, and conferred no right upon Green. It was without consideration, without mutuality, and, as we contend, without force as a contract.

There are only three ways in which a surety can be released: 1st, by payment or satisfaction; 2nd, release or surrender by the creditor; 3d, by acts done by the creditor to the prejudice of the surety and without his knowledge and consent.—Pit. on Pr. & Sur. 111, ch. 5, (mar. 157,) 40 Law Lib.

It is the duty of the surety to inquire and inform himself whether or not his principal had performed the engagement

which he had undertaken he should perform.—Pit. on P. & Su. 70, ch. 1, (mar. 84,) 40 L. Lib.

To release surety there must be a valid common law agreement to give time to the principal.—Agne v. Steele, 8 Ala. 948; Abercrombie v. Knox et als., 3 ib. 728; Wilson v. B'k of Orleans, 9 ib. 847; Pit. on Prin. & Su. 117, ch. 5, (mar. 168,) 40 L. Lib.

There is no obligation to active diligence, on the part of the creditor—(Caller v. Vivian et als., 8 Ala. 905; 6 ib. 309)—nor is even a judgment creditor bound to active diligence.—Bank v. Golden & Lowry, 15 Ala. 616; Sawyer v. Patterson, 6 ib. 616.

The direction to sue, to absolve surety, must be clear and explicit.—Shelean v. Hampton, 8 Ala. 942.

The liability of a surety is merely accessorial, and in this view, we think his admissions were binding upon defendant.—Evans et als. v. Keeland, 9 Ala. 42.

Rice & Morgan, and J. B. Martin, for defendant:

1. It is shown by the bond upon its face, by plaintiff's declaration, and by the conversation between defendant and plaintiff's intestate, that the former was the mere security for Chilton, the vendor, and upon that question the jury found in favor of his suretyship. At all events, the evidence tended to prove that Chilton was the vendor, and that Green was only his surety on the bond, and authorized the court to refer the question of suretyship to the jury.

2. Whenever the obligee or creditor withholds or neglects to communicate to the surety any fact or circumstance material for the latter to know, such neglect amounts to a fraud upon his rights, and he is thereby discharged from the obligation of his suretyship, and that too, whether the motive which actuated the obligee was fraudulent or honest.—Railton v. Mathews, 10 Cl'k & Finn. 942; Waters v. Creagh's Ex'r, 4 S. & P. 410; Harriss v. Brooks, 21 Pick. 194; Reese v. Berington, 2 Ves. jr. C. R. 540; Law v. East India Co., 4 Ves. 829.

3. Where the creditor has the means in his own hands to satisfy his demand, and refuses to use it, but gives it up to the debtor, the surety is discharged.—Ferguson v. Turner, 7 Mo. Rep. 497; Commonwealth v. Miller, 8 S. & R. 452; Baker v. Briggs, 8 Pick. 122; McCollum v. Hinckley, 9 Verm. 149.

(In the present case Bruton had nothing to do but withhold the purchase money, and he promised the surety to do so.)

4. If by the conduct, declarations or assurances of the creditor the surety is induced to believe that he is secure, or loses an opportunity to indemnify himself, he is not to be charged as such security.—Baker v. Briggs, 8 Pick. 122; *Exparte* Wright, 2 Ves. jr. 9; Robins v. Bingham, 4 Johns. 477; Hogaboom v. Heinck, 4 Verm. 131.

5. Whatever would avail the security in equity will constitute a good defence at law.—Taylor v. Bank of Ky., 2 J. J. Mar. 568; Teague v. Russel & Moore, 2 Stew. 420; Stradler v. Haughton, 9 Port. 334; 8 Pick. 122; 18 ib., 95; 5 Ala. 388; 7 Johns. 332; 16 S. & R. 252.

6. The mere admissions or declarations of the principal are not evidence against the surety.—Blair v. P. I. Com., 10 Mo. 567; Bondurant v. State Bank, 835.

7. Under the evidence, the charge was correct. Upon the hypothesis contained in that charge, the administrator cannot recover against the surety of the vendor.—1 Chitty's Pl. 19; Beck v. Simmons, 7 Ala. 71; Clements v. Loggins, 2 ib. 514.

8. The administrator cannot recover on such a bond, without showing a breach of the condition in the life-time of his intestate. No such breach is shown in this case. (See the cases last above cited.)

9. The administrator is estopped by the conduct and conversation of his intestate shown in evidence, from resorting to the surety.

DARGAN, C. J.—This was an action of covenant brought by the plaintiff, as administrator of Lecel Bruton, on a bond payable to the intestate in the penal sum of four thousand dollars, which was executed by Resen R. Chilton and the defendant. The bond is subject to the following condition: "that whereas, the said Resen R. Chilton had bargained and sold unto the said Lecel Bruton, a tract of land, being the south-east quarter of section fifteen, township fifteen, range six east, containing one hundred and sixty acres more or less: Now we the above bounden are to make unto the said Lecel Bruton, a good and sufficient title in fee simple, so soon as a title can be obtained from Jesse Driver, and as soon as this deed is made, this obligation

is to be null and void, otherwise to remain in full force and effect." A verdict and judgment were rendered in favor of the defendant, and the plaintiff brings the case to this court. It is now contended by the defendant in error, that the evidence did not show a breach of the condition of the bond in the life-time of the intestate, and therefore, the plaintiff is not entitled to recover. The bond bears date the 12th of November, 1840, and it was shown that the intestate died in June, 1844. Upon the execution of the bond, he entered into possession of the land, and continued in possession until his death. It was also shown that the title to the land was neither in the obligors, nor in Jesse Driver, but that the fee simple was vested in one Eli M. Driver, and there was no attempt to show that the obligors had executed to the intestate, or to his heirs, a deed conveying the fee simple title to the land, or that they or either of them had acquired the title from Eli M. Driver.

The general principle of law applicable to the question, whether there was a breach of the condition in the bond in the life-time of the intestate, is this, when no time is limited for the performance of a covenant, it must be done within a reasonable time.—Shep. Touch, 166; Cruise's Dig. by Greenl. vol. 2, p. 445. In the case of Garnett v. Yoe, 17 Ala. 74; we held that if a party bound himself to execute titles to land, so soon as he could obtain it, and neglected for two years to make any effort to procure the title, that this was *prima facie* a breach of the condition of the bond. In the case before us, the intestate lived more than three years after the making of the bond, during which time the obligors did not enable themselves to comply with the condition of their bond, nor does it appear that any effort was made by them to procure the title. It is therefore clear, under the authority of Garnett v. Yoe, that this was *prima facie* a breach of the condition of the bond in the life-time of the intestate, and his administrator is therefore the proper party to bring suit, even if the bond could be considered as a covenant that run with the land.

But I cannot yield my assent, that the bond in this case is a covenant that descended to the heir, and that he must sue for a breach happening after the death of the ancestor. The rule of the common law is, that the realty descends to the heir, and all covenants real, which run with the land, go to the heir on the

death of the ancestor as part or parcel of the freehold; and therefore, he must sue for a breach after the ancestor's death.—Chitty's Plead. 19; Williams Ex'r.. vol. 1, 518; Shep. Touch. 175; Cruise's Dig. by Greenl. vol. 2, title 32, p. 453. But to enable the heir to sue, he must show that the land descended to him. If he took no title by descent, I do not see how he can sue on a covenant respecting it. In the case of King v. Jones, 5 Taunton 418, land was conveyed to the ancestor, and the grantor covenanted for further assurance on request; the ancestor thinking a fine was necessary to perfect his title, requested the grantor to have it levied, which, however, was not done, and after his death, the heir was evicted, for the reason that the fine had not been levied. After the eviction of the heir, the executor of the testator brought covenant, but the court held, he could not recover, because the land had descended to the heir, and the ultimate damages had been sustained by him. So in the case of Kingdon v. Nottle, 1 M. & Selwyn, 355, the Court of King's Bench held, that the executor could not recover upon a breach of covenant with the testator, that he, the defendant, had a good title to convey, as the executor suffered no damage in his life-time, and the land descended to the heir, who was evicted. On the other hand, all the authorities agree, that if the covenant is broken in the life-time of the ancestor by his eviction, then his executor or administrator must sue, for the covenant is then turned into a mere chose in action, and the heir takes nothing by descent. Let us test the case before us by this principle. It cannot be pretended that the bond gave to the intestate any title to the land, for the bond shows upon its face, that the title was neither in the obligors nor the obligee, and as the intestate had no title that could descend, his heir could take nothing by descent. The bond is a contract upon its face for the payment of money, the condition of which might be saved by procuring the title to the land, and conveying to the obligee, but by its execution and delivery, the intestate acquired no title to the land, neither at law nor in equity, for the title was outstanding in a stranger to the bond, and so continued until the death of the ancestor, and even to the present time; the heir therefore could take nothing by descent, and the administrator is the proper party to sue, whether the breach of the condition happened before or after the death of the

intestate. It is not, however, to be understood that we intend to decide, that the executor or administrator may sue in all cases on a bond for titles, for a breach of the condition after the death of the obligee; for if the obligor had the title to the land, it may be that in equity the heir would be considered as taking the fee by descent, and therefore entitled to file a bill for a specific performance, and possibly to sue on the bond for a breach of the condition after the death of his ancestor. This question is not before us, and therefore we do not intend to decide it. But I intend to confine the decision to this point: that where the obligor has no title, and the bond shows that he is to procure the title from another and to convey to the obligee, and the obligor never obtains the title, nor procures a conveyance of the title to the obligee, the heir cannot take the land by descent, nor sue in his own name for a breach of the condition, whether that breach happened before or after the death of the ancestor.

2. It also appeared from the evidence that Green, the defendant, was the security of Resen R. Chilton, and that in a short time after the execution of the bond, and after the intestate had taken possession of the land, but before he had paid any part of the purchase money, that Green informed him there was difficulty about the title of the land; that the title was in Eli M. Driver and not in Jesse Driver; that he suspected there was something wrong on the part of Chilton, and then requested the intestate not to pay the purchase money until he got the title, and if he did, he must do it at his own risk. The intestate said to Green in reply, that he would not pay the purchase money until the matter was arranged, and that he would see Chilton and get him to arrange it, and if Chilton would not, he would see Driver and get it arranged with him before he would pay the purchase money. It also appeared, that at the time of this conversation Chilton was in possession of considerable property, but is now insolvent. The court in effect charged the jury, that if they believed this testimony, and that Green was lulled into security by Bruton, and induced to believe that he was safe, and that Bruton did nothing in his life-time but slumbered on his rights, then the plaintiff could not recover.

I can see nothing in the conversation between Bruton and Green that will discharge the latter from the obligation of his bond, although the purchase money was paid to Chilton after-

wards. There are but three modes by which a security can be discharged from his contract. The first is by payment or satisfaction of the debt; the second by release; and the third by the acts or conduct of the creditor in violation of his duty to the security, and which are or may be prejudicial to his interest.

It is not insisted that the evidence shows either a satisfaction of the bond, or an intentional release of the security; but it is insisted that the payment of the purchase money by the obligee after notice that the title was not in Jesse Driver but in Eli M. Driver, and his promise not to pay it until the difficulty about the title was arranged, must operate in law as a discharge of the security. To test this argument, let us suppose the purchase money never has been paid, and that the reason of it was that Chilton, the principal in the bond, could not procure the title. The obligee then would have faithfully observed the promise he made to Green, the security, in withholding the payment of the purchase money, but surely he would be entitled to sue for a breach of the bond. If he, the obligee, had not violated the contract on his part, the non-payment of the purchase money would go in reduction of the damages, not in *discharge of the action.*

Again, let us suppose the terms of the contract such that Bruton, the obligee, could have refused to pay the purchase money until the title was secured to him, and being informed of the difficulty about the title, he promised Green, the security, not to pay the purchase money until the title *was arranged;* but disregarding his promise, he did pay when not compelled by his contract to do it—what would be the rights of Greene? He could not, in my judgment, claim to be released from the bond. He could in the case supposed only claim a reduction of the damages to the extent of the purchase money. The rule, we think, is this: if a creditor gives up or releases a collateral security for the payment of his debt, without the consent of the surety, he, the surety, will be discharged to the extent of the value of the collateral security only.—Neff's Appeal, 9 Watts & S. 3; Baker v. Briggs, 8 Pick. 122. If we consider then that Bruton, the obligee, had the right under his contract to hold on to the purchase money, because the title was in E. M. Driver, and his promise to Green bound him not to pay until he obtained the title, still there has been a breach of the condition of the bond; and Green could only insist that the damages be reduced to the

extent of the purchase money. In any point of view, whether the purchase money has been paid or not by Bruton, if he has not violated the contract on his part, the action can be sustained; and consequently the instructions of the court were erroneous.

It will be observed, that we have argued the case upon the supposition that the purchase money has not been paid, and also upon the supposition that it had been paid, after the promise made by Bruton to Green. In conclusion, we must remark, that the record furnishes no evidence that Bruton ever paid the purchase money, nor does it show when, or under what circumstances, he was bound to pay.

If upon another trial, the terms of the contract in relation to the purchase of the land are disclosed, and it appears that Bruton paid the purchase money, in conformity with the terms of his contract, and could not have refused to do it without a breach on his part—in that case, we do not intend to decide whether or not Green could insist on reducing the damages to the extent of the purchase money. We only intend to decide, that if Bruton could have retained the money consistently with his contract until the title was secured to him, he was bound by his *promise* to Green to do it; and if in violation of this promise he paid the purchase money over to Chilton, when he had the legal right to retain it, that Green can reduce the damages to the extent thereof.

There is no error in the record, save in the instructions given to the jury, and for this the judgment must be reversed and the cause remanded.

KIRKSEY, Trustee, &c. *vs.* DUBOSE.

1. When a sheriff justifies under mesne process, after the time appointed for its return, he must either aver its return, or show some legal excuse why it was not returned.
2. When the judgment entry shows, that the plaintiff demurred to the defendant's pleas, and that the demurrer was overruled, and the demurrer also appears upon the record, this court will not look to the

order in which the clerk has recorded the pleadings, and determine that the demurrer was waived, because issues of fact precede it.

3. The plaintiff in error, by showing a verdict for the defendant upon insufficient pleas, shows an error *prima facie* prejudicial to him, and it is the duty of the defendant to make the record affirmatively show that no injury resulted from the error, if such was the case.

4. The maker of a deed of trust may be made a competent witness to sustain it, by first showing his certificate of discharge under the Bankrupt act, obtained subsequently to the execution of the deed, and also his release to the assignee in bankruptcy, of all interest which he may have in the suit.

5. The act of 1845, which renders the defendant in execution an incompetent witness on a trial of the right of property under the statute, allowing a claim to be put in to property levied on, is in derogation of the common law, and will not be extended to the ordinary common law actions, or causes in equity, for the recovery of damages, or the specific property, in which the title may be put in issue.

6. If the writs of attachment, under which the sheriff justifies, are regular on their face, he is not bound to go beyond them, and show affidavits and bonds, or that there was a subsisting debt, on which they might properly issue.

Error to the Circuit Court of Marengo. Tried before the Hon. Geo. D. Shortridge.

This was an action of trespass commenced by Cicero L. Kirksey, against the sheriff of Marengo county, for levying on a stock of goods which the plaintiff claimed as trustee under a deed of trust, executed to him by one Wm. A. D. White, to secure certain creditors. The original plaintiff died after the institution of the suit, which was then revived in the name of the present plaintiff, who was his administrator, and who was appointed trustee in his stead by the Circuit Court.

The sheriff justified under two writs of attachment, one in the name of John Stephenson v. Wm. A. D. White and James H. Curtis, the other in the name of W. P. Lay v. Isaac Stiles. Each special plea averred the issuance of the attachment, its receipt by the sheriff and levy, and that the goods were the property of the defendant in attachment, but did not aver the return of the attachment, or show any reason why it had not been returned. These pleas were demurred to, and the demurrer overruled; but in the transcript replications are inserted before the

demurrer, and the order on it. The defendant not having introduced or proved any affidavit or bond for the issuance of the attachments, or either of them, and not having shown that said writs had been returned into the courts to which they were returnable, the plaintiff moved the court to charge the jury, that if such were the case, the defendant's pleas of justification were not sustained. The court refused to give this charge, and the defendant excepted.

The other material facts of the case appear in the opinion.

MANNING for plaintiff in error:

1. The second and third pleas of justification are defective, because they do not allege a return of the attachments.—McAden v. Gibson, 5 Ala. 341, and cases there cited.

2. A grantor, who is divested of all interest in the event of the suit, either by a release from others to him, or a release from him to others, is a competent witness to prove the fairness of his deed.—1 Greenl. on Ev. p. 464-472-3; Jackson v. Root, 18 John. 60; Kinlock v. Palmer, 1 Const. Rep. (S. C.); Woods v. Williams, 9 John. 123; Gillespie v. Gillespie, 2 Bibb 89; Wall v. Nelson, 3 Litt. R. 395; Bagley v. Osborn, 2 Wend 528; even though the deed be impeached as fraudulent; Jackson v. Frost, 6 John. 135; Simmons v. Parsons, 1 Bai. 62.

3. The act of Congress in relation to bankrupts, makes the certificates only of their discharge sufficient evidence thereof, in any suit or proceeding against them for antecedent debts; much more is such a certificate sufficient evidence to the presiding judge, that the person to whom it is given is a certificated bankrupt, when the question arises collaterally in a suit to which he is not a party.

4. The act of 1845, making defendants in execution incompetent witnesses in certain cases, applies only to a peculiar action, the trial of the right of property, which was created by statute.—Dearing v. Windham, 11 Ala. 204; Frow v. Downman, Ib. 883. The proceeding between Scott et al. and Stallsworth, (12 Ala. 25,) was precisely that action, though the subject of it was a credit instead of a chattel.

5. The defendant ought to have proved that the attachment had been duly returned.—McAden v. Gibson, 5 Ala. 341.

6. And as the plaintiff in this suit was not a party to the

writs of attachment, but had possession of the property seized, by virtue of a deed made long before, the defendant ought to have produced the affidavit and bond, or one of them, upon which the attachment was founded.—Damon v. Bryant, 2 Pick. 411; Jansen v. Acker, 23 Wend. 480-1; Noble v. Holmes, 3 Hill's 194.

The cases of Houston, adm'r. v. Prewitt (8 Ala. 846,) Powell v. Powell (10 Ib. 900,) and Clifton v. Sharpe, (15 Ib. 618,) are not at all parallel with this. White was not the assignor of a chose in action, but of veritable chattels (goods, wares and merchandize,) of which he was in possession, and the possession of which he transferred to his grantee as he had previously received it. If there were any choses in action in the case, they were the interests which the plaintiffs in the attachments sued out those writs for the purpose of establishing. It is a solecism to say that my property of which I am enjoying the possession, or which I transfer corporally to another, is either in him or me reduced to a chose in action, because another person claims some interest in it; his interest (if any,) is the chose in action.—See Ex'rs. of Robertson v. Allen, 16 Ala. 109.

Brooks, *contra:*

1. In an ordinary trial of the right of property under the statute, the grantor, White, would be an incompetent witness under the act of 1845. This action is trespass, but that does not alter the case. It is to all intents and purposes a trial of the right of property. The object of the law was to render the grantor an incompetent witness to sustain his deed of trust or mortgage in a contest between his grantee and his creditors. The substitution of one action for another will not make the witness competent. The law was not intended to apply to the form of the action, or to exclude the witness on the ground of interest, but upon the grounds of public policy.—Brumby v. Langdon, 10 Ala. 749; Scott, Slough & Co. v. Stallsworth, 12 Ala. 25; Yarborough v. Moss, 9 Ala. 388. And he remains disqualified, although he should become a certificated bankrupt; Carville v. Stout, 10 Ala. 796-802.

2. When the suit was commenced, White was entited to such portion of the damages recovered therein, as might remain after the payment of his debts. This right to damages was a chose

in action (Bro. Title Chose in Action, Lilly Abr. 264.) To enable the witness to testify in this suit, he released his interest. In other words he was the assignor of a chose in action, and therefore incompetent on the score of public policy.—Powell v. Powell, 10 Ala. 911; Houston v. Pruitt, 8 Ala. 846; Clifton v. Sharp, 15 Ala. 618.

3. In trespass against the sheriff for taking goods under an attachment, the defendant in attachment is not a competent witness for his grantee (Barnes v. Taylor, 3 Por. 187; Pruit and Martin v. Lowry, 1 Por. 101; 3 Ala.,) and White was also interested in diverting the property in controversy from the payment of Stiles' debts, and causing it to be applied to the payment of his own. The certificate in bankruptcy alone was insufficient evidence to show that his interest had been removed, and his competency restored. That was no evidence of his discharge. The copy of the record, or so much thereof as was necessary, should have been produced. The certificate is merely the conclusion of the clerk as to the effect of the record. By act of Congress, it is made evidence for the bankrupt himself in proceedings against him, but in no other case; and it may well be questioned, whether Congress can furnish to the State Courts a rule of evidence in proceedings between her own citizens.

4. In trespass against an officer for illegally taking the goods of the plaintiff, he may justify under the process alone, if it be regular upon its face.—Fortner & Flannaghan v. Drim, 3 Por. 257; Morrison & wife v. Wright, 7 Por. 68; Parker v. Walrod, 16 Wend. 514; Shepard et al. v. Nabors, 6 Ala. 637.

5. The demurrers were properly overruled. The plaintiff took issue in the County Court, in the year 1842. In 1845, the cause was transferred to the Circuit Court. At the May Term, 1848, the plaintiff without having withdrawn his replications, demurred to the 2d and 3rd pleas. He cannot reply and demur to the same plea at the same time; much less can he demur after having taken issue.

6. But if the court erred, the plaintiff cannot complain; it does not appear that he sustained any injury thereby. What is his title to the property. He claims, he says, through a deed of trust. It does not appear when the deed was made, or that it was made before the levy of the attachments. It does not appear that the deed was registered; nor does it appear that the

property in controversy was embraced in the deed. The plaintiff does not show that either himself or White ever had at any time any possession of, or right or title to the property in question. It is to be borne in mind, that the sheriff pleads, not only not guilty, but he also justifies under an attachment against Stiles. Although the pleas of justification may have failed, it does not appear that the plaintiff was entitled to recover. Dubose had the property in possession; he is the only person, who, as far as the evidence discloses, ever had it in possession, and he may be well entitled to a verdict under the general issue.

In trials of the right of property, the plaintiff is not bound to produce the judgment; the production of the execution is sufficient.—Carlton, et al. v. King, 1 S. & P. 472; Hardy, et al. v. Gascoigne & Holly, 6 Por. 447; Pettis, adm'r. v. Taylor, 8 Por. 564; Huff v. Cox, 2 Ala. 314; the production of the attachment is sufficient evidence of the debt, and the plaintiff is bound to produce no more.—Butler & Alford v. O'Brien, 5 Ala. 316; Yarborough v. Moss, 9 Ala. 382; see also 16 Ala. 271, and 14 Ala. 326.

CHILTON, J.—1. It is well settled, that if a sheriff justifies under *mesne* process after the time appointed for its return, he must either aver its return, or show some legal excuse why it was not returned.—See McAden v. Gibson v. 5 Ala. 343, and the cases there cited. The two special pleas in the case before us, contain no such averment, and the demurrers to them were improperly overruled by the court.

2. The judgment entry shows that the plaintiff demurred to the two pleas of justification, and that the demurrers were overruled; the demurrer also appears upon the record. Under these circumstances, we think it very clear, that we cannot look to the order in which the clerk has recorded the pleadings, and determine that the demurrers were waived, because issues of fact precede the demurrers; but we must presume rather that the clerk has inadvertently inverted the order of pleading in the transcript.

3. But it is contended by the counsel for the defendant, that although the court may have erred in upholding these pleas, yet this court should not reverse, as it is not shown that any injury resulted to him. The plaintiff does show injury when he shows

a verdict for the defendant upon insufficient pleas, and having shown that the court committed an error *prima facie* prejudicial to him, it was the duty of the defendant to make the record certify to us, that no injury resulted from the error, if such was the fact. In Marshall v. Betner, we said that if the entire record affirmatively show that the plaintiff never can recover, and the matter which renders a recovery impracticable is obvious and undisputed, the court will not reverse, for in such case, it would do a useless thing.—(17 Ala. 836.) This case however, is not shown to fall within that category.—See also, Davis v. The State, 17 Ala. 415; Seawell v. Henry, 6 Ib. 226.

4. As the case must go back, it becomes our duty briefly to notice some other questions presented by the bill of exceptions, and which will probably arise in the further progress of the cause. We are informed that the plaintiff claimed title under a deed made to him as trustee to secure certain debts due from the maker, and White, who was the maker, was offered as a witness to sustain the deed. In order to render him competent, the plaintiff produced the certificate of his discharge in bankruptcy obtained subsequent to the making of said deed, and also a deed assigning, setting over and releasing all interest he might have in the recovery in this suit, and in all his effects, to the assignee in bankruptcy, for the use of his (White's) creditors, and the surplus, if any, to go to the use of the assignee in his individual right, but without recourse on White. The first objection raised to this witness is, that he has such interest as he cannot release so as to render him competent. Mr. Greenleaf holds that there is no interest of a disqualifying nature but that may in some manner be annihilated.—1 Greenl. Ev., § 428, citing Perryman v. Steggal, 4 C. & P. 197; Van Shaack v. Stafford, 12 Pick. 565—see also, 1 ib., § 426. We do not think this witness occupies such position as that he cannot release his interest. If any surplus remains, or any interest accrues to him by reason of the recovery, it would vest in his assignee in bankruptcy, who by the release would be exonerated from all liability to account for it to the witness. No case in our reports goes to the length of holding that White cannot be made competent by a release. It is not the case of a transferror becoming a witness for the transferree to support the transfer, as in the cases of Houston, adm'r, v. Pruitt, 8 Ala. 846; Maury's Adm'r v. Mason's Adm'r, 8

Por. 211; Powell v. Powell, 10 Ala. 900, and Clifton et al. v. Sharp, use &c., 15 ib. 618. In the cases cited, it was held that the witness could not assign the chose in action and support the assignment by his own testimony, as this would be against the policy of the law, as letting in all the evils of champerty; but in the case before us the interest in the property had already vested by the deed in the trustee, if the grantor had title. This was the sale of a thing in possession, and if a surplus remained in the hands of the trustee, then that surplus vested in the assignee in bankruptcy, and it was certainly competent for the witness to release the assignee from all obligation to pay over the same to him. We do not see how any principle of public policy would be violated, in permitting such an interest to be released. We deem it unnecessary to decide upon the effect of the certificate of discharge, as upon a subsequent trial, the party can procure the transcript of the record, if its production be not waived. If White be discharged from his debts, he has no *legal* interest in having property devoted to their payment, if by his release he can never succeed to the residuum after the debts are paid, so that the argument that he is interested in defeating the creditors of Stiles by applying it to the payment of his own debts, cannot avail the defendant in error.

5. But it is insisted that White, being the defendant in the attachment, was rendered incompetent by the act of 1845, which makes defendants in executions incompetent witnesses upon the trial of the right of property under the statute allowing claims to be put in to property levied upon. In Easly v. Dye, 14 Ala. 164, this court said, (Collier, C. J.,) "This enactment introduces an arbitrary rule, irrespective of the interest of the witness, but is applicable to a specific case, and cannot be extended by construction to an ordinary action in which the title to personal property is litigated." We think the act being in derogation of the common law, and introducing a disqualification as applicable to the statutory remedy designated, we should not only push it beyond the intention of its framers, but should violate the settled policy of the law which restricts such disqualifications, were we to extend its provisions to the ordinary common law actions or to causes in equity, instituted for the recovery of damages or specific property in which the title may be and usually is put in issue. The cases of Yarbrough v. Moss, 9

Ala. 382; Webster v. Smith, 10 ib. 429, and Brumby v. Langdon & Co., ib. 747, do not militate against this view. The reasoning in the case of Scott, Slough & Co. v. Stallsworth, 12 Ala. 25, would seem to lead to a different conclusion, but it occurs to me that it would amount to judicial legislation to extend the disqualification to all suits when the Legislature has limited it to a particular species of trial.

6. If the attachments were regular on their face and authorised a levy upon and seizure of the defendant's property, the sheriff is not bound to go beyond them and show bonds and affidavits, or that there was a subsisting debt on which they might properly issue.—Governor v. Gibson, 14 Ala. 327.

Perhaps what we have said will be sufficient direction for the future conduct of the cause.

Let the judgment be reversed and the cause remanded.

ARMSTRONG *vs.* HUFFSTUTLER, ADM'R., &c.

1. In seeking to impeach a witness by showing that he has made declarations inconsistent with his testimony, it is not necessary in laying the predicate, that the language used by him should be stated, but the substance of what he is supposed to have said, is all that is required.
2. Although it is the duty of the vendor to disclose to the vendee such intrinsic defects in the property sold as materially affect its nature and condition, which lie especially in the knowledge of the seller, and which the purchaser cannot, by the exercise of proper diligence, discover; yet the law does not require him to disclose "the fullest extent of that unsoundness," by describing particularly the different stages and symptoms of the disease, and all the circumstances attending it.
3. When the purchaser pays what would be an inadequate price if the animal purchased was sound, it is a circumstance to which the jury may look, in connection with other proof, in determining whether or not he was advised of the latent unsoundness of the animal, if there was any.

ERROR to the Circuit Court of Blount. Tried before the Hon. W. R. Smith.

THIS was an action commenced before a justice of the peace by Huffstutler, on an instrument in writing, for the payment of eighty-five bushels of corn; executed by Armstrong to plaintiff's intestate. A verdict was rendered for the plaintiff before the justice, and the defendant appealed to the Circuit Court, where a new trial was had, and another verdict rendered for the plaintiff. It appears from the bill of exceptions, that the note was given for a mare sold by plaintiff's intestate in his life-time to defendant. Plaintiff introduced one Harris as a witness, who swore that he thought the mare at the time of sale was worth ten or fifteen dollars. On cross-examination, defendant asked him, if he had not said to Archelaus Walker and James Blakely, at a certain time and place named, "that he thought the mare worthless at the time of sale;" witness replied that he did not recollect having told them so. Defendant then introduced Walker and Blakely, and asked them the same question, to which they replied that Harris did not use the word "worthless." Defendant then proposed to vary the question, and ask, if Harris did not, at the time and place mentioned, say, "that he thought the mare was of no value at the time of sale." Plaintiff objected to this question, and the court sustained his objection, to which the defendant excepted. There was also evidence that the mare was unsound at the time of the sale. The defendant asked the court to instruct the jury, "that if the defendant was not fully informed by the seller, not only that the mare was unsound, but of the fullest extent of that unsoundness, so far as the same was known to the seller, and could not be seen by the defendant at the time of the purchase, although it may have been discoverable a few days afterwards, then a fraud was practised, and if the mare proved to be entirely valueless, because of that unsoundness, they must find for the defendant," which charge the court refused to give, and the defendant excepted.

The court charged the jury, "that if the mare was sold for a sound price, or what would be her value if sound, this would raise the presumption of fraud, and this presumption would have all the force and effect of evidence of fraud, unless the facts in testimony should upset that presumption; and if she was sold

for an unsound price, or what would be less than her value if sound, that this would be presumptive evidence that she was sold as unsound." To which charge defendant excepted.

POPE, for plaintiff in error.

HUMPHREYS, *contra*.

CHILTON, J.—In Nelson v. Iverson, 17 Ala. 216, we held that when the object was to impeach a witness by showing that he has made declarations inconsistent with his testimony, it is not necessary in laying the predicate, that the language used by the witness should be stated, but the substance of what he is supposed to have said is all that is required. In this case, the witness sought to be impeached was asked if at a certain time and place, which were particularly described, he had not stated to Walker and Blakely that the mare was *worthless* at the time of the sale. To this, he substantially answered in the negative. The witnesses proved that he did not say she was *worthless*, but it was proposed to prove that he said she was of *no value*. This mere verbal difference did not render the proposed proof incompetent, and is fully covered by the case above cited. As to the relevancy of the proof, see Daniels v. Conrad, 4 Leigh, 401; 2 Phil. C. & H. notes, 772, et seq. As to the question of fraudulent concealment attempted to be raised by the charge asked by the counsel for the defendant below, and refused by the court, it is only necessary to say, that it applied to the vendor in requiring him not only to disclose that the animal was unsound, "but the fullest extent of that unsoundness," a more rigid exaction than the law makes upon him. Such particularity would require of the seller to enter into a minute history of the supposed disease, to describe with accuracy its different stages, and the symptoms attending it, which would tend greatly to impede the facilities of sales, and expose vendors to great insecurity and perils. While, however, the law does not require such particularity, yet in respect to intrinsic defects, such as materially affect the nature and condition of the property, which the purchaser could not by the exercise of proper diligence have discovered, and which were especially within the knowledge of the seller, the silence of the vendor would be considered a fraud,

which would avoid the contract, if it had the effect of deceiving the purchaser.—Story on Con. § 519.

As to the legal proposition involved in the charge given by the court, it may be sufficient for the future conduct of the cause to say, that the price agreed to be paid may be looked to by the jury as a circumstance, in connection with the other proof, in determining whether the purchaser was or was not advised of the latent unsoundness of the animal, if there existed any, and that he contracted with reference to such unsoundness. If the animal, had she been sound, was worth one hundred dollars, and the purchaser acquired her for ten dollars, this would be a circumstance which would tend strongly to show that there was no imposition practiced on the seller. On the other hand, if by reason of intrinsic latent defects, she was worth only ten dollars, and the purchaser gave one hundred dollars, the folly of such a contract would be so extremely gross as to tend when taken in connection with other facts in corroboration to establish a case for relief on the ground of fraud. Such fact, taken isolated from all others, would not justify a presumption of fraud. It is evidence in such case of mere folly and weakness, or want of judgment as to the value of the article, which it is said will not defeat a contract, even in equity.—See Milner v. Cowley, 8 Price, 620; Prebble v. Boyhurst, 1 Swanst. 329; Oliphant's Law of Horses, 84; 58 Law Lib. 87. We do not deem it necessary to go into a more critical examination of the charges.—See further on the subject, Ricks v. Dillahunty, 8 Por. R. 133. For the error in excluding the evidence of Walker and Blakely, the judgment must be reversed, and the cause remanded.

HAWKINS *vs.* GILBERT & MADDOX.

1. When a party has entered into a special contract to do certain work, or perform a specified service, and the work is done, but not according to the terms of the contract, yet if it is accepted by the party for whom it was to be performed, and is beneficial to him, the party performing it may recover on a *quantum meruit*, the value of the work done, or services rendered.

2. But if, after having commenced the work, he abandons it before it is finished, without sufficient cause, he cannot recover for the work and labor done.

ERROR to the Circuit Court of Lowndes. Tried before the Hon. Geo. Goldthwaite.

GILBERT & MADDOX brought their action of assumpsit against Hawkins, to recover damages for the breach of a written contract. The contract declared on shows that the parties contracted to repair and carry on two mills, the property of the defendant, until July 1855, in partnership. Each party was to contribute in certain proportion the materials and labor necessary to repair the mills, and to work them, and the profits were to be equally divided between them. The plaintiffs, who were mill-wrights, worked themselves in repairing the mills, and furnished most of the materials, but abandoned the work, without having completed it. "The evidence was conflicting, as to whether the plaintiffs or the defendant had first violated the contract."

The defendant asked the court to charge the jury, that if they found from the evidence, that the work done, and materials furnished by Maddox, were done and furnished under the contract set out, and the plaintiffs had not complied with the terms of said contract, then they could not recover on the common counts for the work done, and the materials furnished. This charge the court refused, but charged the jury, that if they found from the evidence, that the plaintiffs had done work, and furnished materials of value to the defendant, in and about the mills, and the defendant appropriated the same to his own benefit, and availed himself of such work and materials, the plaintiffs could recover for the value of such work and materials, notwithstanding they may not have complied with the terms of the contract on their part. The defendant excepted to the refusal to charge as requested, and to the charge given, and now assigns them as error.

STONE & JUDGE, for plaintiff in error:

The contract declared on shows that the parties became partners in the mill business. Each party was to contribute in certain proportion the materials and labor necessary to carry on the work; and for a definite period, the parties were to share

the proceeds and profits of the mills equally. No part of the contract contemplates a payment of money for the work. The decision of the court is, that notwithstanding Gilbert and Maddox may have voluntarily abandoned their contract, and quit the work, still Hawkins having continued to run the mills, is liable to the plaintiffs for the value of the work and materials. Can this be law? Is this not allowing the parties to take advantage of their own wrong? Will Gilbert and Maddox, after they learn that their partnership is not likely to prove profitable, be permitted by their own wrong, to convert their claim into a money demand for work and labor and materials? We think not.

The authority on which this decision was made by the court below, and on which we presume defendants in error rely, is Merriwether v. Taylor, 15 Ala. 735. That case does not sustain them. It simply decides that if work be done under a special contract, not strictly in accordance with it, but yet of some value, if it be accepted and used by the contractor, he shall pay its value. We apprehend no respectable authority can be found which extends the principle farther. This does not change the mode of reimbursement or payment, but proceeds on an entirely different ground.—See also, Thomas & Trott v. Ellis, 4 Ala. 108. We suppose no case analogous to this can be found. This is in our favor. Some principles are so clear, that no direct authority can be found upon them. This, we think, is one of that class. The general rule is that when parties make a contract, and stipulate a mode of payment, neither party can, without the consent of the other, change that contract, or the mode of payment. Courts do not make, but enforce contracts.

Elmore & Boling, *contra:*

1. The witness Buffington testifies that Hawkins said to him, if Maddox did not come to some understanding with him by a particular time, he would make a smash of the business; that he had put up one advertisement already, and intended to put up another. This was communicated to Maddox. An advertisement (a copy of which appears in the record,) was seen by witness in the mills, and another some distance from the mills. Hawkins had notice to produce these papers. The evidence was properly admitted under this state of facts, and in connection with them.

2. The evidence tends to show that Hawkins prevented Maddox from performing the contract on his part, (if he failed to perform his part of it.) The rule is, that a recovery may be had for work and labor, when the defendant has accepted the work, although it does not amount to a complete performance of the special contract.—Merriweather v. Taylor, 15 Ala. 739; Thomas & Trott v. Ellis & Co., 4 Ala. 108; 2 Greenl. Ev. § 104; 7 Ala. 753. The charge refused, and the one given, should be construed in connection with the testimony, particularly that part showing the conduct of Hawkins.

DARGAN, C. J.—When one party has entered into a special contract to do certain work, or perform a specified service, and the work is done, but not in conformity with the terms of the contract, yet if it be accepted, and is beneficial to the party for whom it was to be performed, the party performing the work, or rendering the service, may recover on a *quantum meruit* as much as the work or service is reasonably worth, notwithstanding it be not performed according to the terms of the special contract. This principle we consider as well settled by authority as it is in consonance with the principles of justice.—Hayward v. Leonard, 7 Pick. 191; Greenl. Ev. vol. 2, § 104, and the cases by him cited; Thomas & Trott v. Ellis & Co., 4 Ala. 108; Taylor v. Merriweather, 15 Ala. 735.

But we have seen no case that holds the law to be, that a party may abandon the work without cause or reason, before it is finished, and recover on a count for work and labor. Such a principle would enable a party to violate his contract with impunity, and still recover for the service rendered, or labor performed.—In the case of Givhan v. Darley, adm'r., 4 Ala. 336; the contract was, that Darley should serve Givhan, the defendant, as overseer for the year 1839, for which service he was to receive six hundred dollars; Darley died in about two months after the service was commenced, and his administrator brought assumpsit for work and labor done, and contended that he should be allowed to recover a *pro rata* part of the sum agreed to be paid for the year's service. But this court held after a full examination of the authorities, that the administrator could recover nothing. In the course of the opinion, it is said, "it may be regarded as a settled principle of law, that where one has under-

taken to serve another for a definite time for certain wages, or where an entire contract has been entered into for the performance of a number of acts, it is not competent for the party after he has performed his contract in part, causelessly to decline proceeding further with it, and recover upon a *quantum meruit.*" The judge who delivered the opinion then cited many cases which go to sustain this principle, which renders it unnecessary to cite them here. The propriety of this rule cannot be better illustrated than by the facts of this case. The plaintiffs under this agreement were not entitled, even if the contract had been completed, to demand any money from the defendant; they would only have been entitled to the share or proportion of the profits of the mills they stipulated for, as a compensation for their labor in erecting and repairing the mills, and the materials they were to furnish. Now suppose they had discovered the contract to be a bad one, and on this account abandoned the work without excuse or sufficient reason, to allow them to recover on a *quantum meruit*, as much as their labor and materials are worth, would enable them to relieve themselves from the consequences of a contract by a voluntary violation of its provisions. Testing the charge of the court by these general rules, we think it clear, that it cannot be sustained. It holds the law to be that the plaintiffs could recover for the value of the materials and their labor, notwithstanding they failed on their part to comply with their contract. In this, the court erred. But it is contended that the evidence discloses a sufficient excuse or reason for the plaintiffs' abandoning the contract on their part, as the defendant has not fully complied with his engagement, and especially as he declared to them that he would not comply with his agreement. In reply to this, we can only say that the bill of exceptions shows it was a contested fact, whether the contract was first violated by the plaintiffs, or by the defendants, and the charge given was well calculated to induce the jury to believe that the plaintiffs could recover, although the breach was on their part, and without regard to the question, whether or not they had any just and sufficient cause to abandon the contract. It was therefore well calculated to mislead the jury; indeed under this charge it became unnecessary for them to do more than estimate the value of the labor done by the plaintiffs and of the materials which they furnished, without considering whether or

not they had a sufficient reason to abandon their agreement. Upon another trial, no doubt, the question will be whether the plaintiffs had a sufficient excuse to abandon the contract. But we do not feel at liberty to express any opinion upon this point as the case is now presented.

Let the judgment be reversed, and the cause remanded.

THOMPSON *et al. vs.* JOHNSON.

1. An instrument founded on a valuable consideration, in form a deed executed by both parties, and as such capable of full effect, and manifestly intended to convey a beneficial interest to the grantee, to take effect and be enjoyed in the grantor's life-time, must be regarded as a deed, and not as a will.
2. The same instrument cannot operate both as a deed and as a will.

ERROR to the Probate Court of Sumter.

THE Probate Court of Sumter, on the application of Johnson, admitted to probate as the last will and testament of James Thompson, deceased, an instrument in writing which is sufficiently described in the opinion of the court. The plaintiffs in error, as two of the heirs at law of said Thompson, contested the probate of the instrument in the court below, and bring the case to this court by writ of error to reverse the decree of the Probate Court.

A bill of exceptions was taken on the trial of the case, which it is unnecessary to notice.

HILL & HALE, for plaintiffs in error:

The counsel for the plaintiffs in error insist that there is error in the record, in this, to-wit:

1. That the said pretended will was admitted to probate when it was not testamentary in its character and was not designed by the maker of the same as a testamentary disposition of his property.

2. The court erred in its decree admitting to probate the said paper as the last will and testament of the said James Thompson.

In support of the first and second assignments of error, the counsel for the plaintiffs in error refer the court to the following authorities.—1 Black. Com. (book 2d, ch. 32,) 404; 1 Jarm. on Wills, ch. 2, p. 11, 12, 13, (note F.); 1 Wms. on Ex'rs, 9, 61; Epistle to the Hebrews, ch. 9, v. 16, 17; Glynn v. Oglander, 2 Hagg. 428; Dunn *et ux.* v. Bank of Mobile, 2 Ala. 155; Stephens et al. v. Nabors, ib. 636; Thompson v. McDonald, 2 Dev. & Bat. Eq. 463.

J. O. Williams, *contra:*

The counsel for defendant in error insists that there is no error in the record.

1. There was no error in admitting this instrument to probate as a will—see 2 Ala. 158; 6 ib. 636; 1 Lomax, 11; Habergham v. Vincent, 2 Ves. jr. 204.

2. It is not true as alleged, nor do the authorities quoted show that the test of a will is its revocable quality. An instrument may be revocable and not be a will, *e. g.* a deed reserving a power of revocation, a letter of attorney.

3. An instrument may be testamentary and yet be a deed in trust too, and so may be in part irrevocable—(Peacock v. Monk, 1 Ves. 127; Thomkins v. Ladbroke, 2 Ves. sen. 591; Allison's Ex'rs v. Allison's Heirs, 4 Hawk. 144)—which cases are in their facts the same as the case at bar, against which there is no authority in the books. Note F, in Jarm. on Wills, (the only authority relied on by plaintiff's counsel,) besides being very indefinite, is a mere dictum of the author.

4. James Thompson thought that he was making a will. He appointed Abraham Johnson his executor, and James E. Johnson his alternate executor. The bare nomination of an executor will constitute a will.—1 Lomax, 66. Said Thompson directed his executors after his (Thompson's) death to pay all his (Thompson's) debts. He named his legatees and bequeathed the balance of his property left after his estate was settled up amongst his said legatees, making to each a special bequest.

PARSONS, J.—The bill of exceptions was prepared probably in haste. It is so defective that I think we cannot act on it

for any purpose, but in the view we take of the case it is not necessary to do so.

One of the assignments of error is this, that the Probate Court erred in admitting the instrument to probate as the last will and testament of James Thompson. Now, if the instrument on its face shows conclusively that it was a deed and not a will, then this assignment of error must be sustained. When instruments of the kind can have no effect as deeds, but may operate as wills, it is the strong inclination of the courts to take them as wills, so that the party's objects may be accomplished. But no such reasoning can apply to this case, because the instrument is effectual as a deed and in fact precludes the possibility of its operating as a testamentary writing. A will must take effect after the death of the testator; this is disputed by no one: and I believe it has not been directly denied in any of the cases, that an instrument founded on a valuable consideration, in form a deed executed by both parties, and as such capable of full effect, and manifestly intended to convey a beneficial interest to the grantee, to take effect and be enjoyed in the grantor's life-time, must be regarded by the courts as a deed and not as a will. That is the case before us. The doctrine was well stated in Habergham, v. Vincent, 2 Ves. jr. 230, by Mr. Justice Buller, that "the cases have established, that an instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity; and in one of them there were express words of immediate grant, and a consideration to support it as a grant; but as upon the whole the intention was it should have a future operation after death, it was considered as a will." If some few cases have gone further than this, they are of doubtful authority, as the case of the Attorney General v. Jones, 3 Price, 408, but more fully stated in 1 Jarm. on Wills, 15; or they rest upon special circumstances, upon which alone they can be supported, consistently with the admitted rule, that an instrument cannot be a will, if it is to take effect in the life-time of the maker. It may be collected from a variety of cases that one and the same instrument cannot be both a will and a deed. Then, what is the case at bar? Abraham Johnson had become James Thompson's surety in a large amount, and bound himself to be his surety in

another large amount; was his creditor in another sum; had advanced money for him and agreed to advance more, all specially stated, and Thompson was desirous to secure him; and by an indenture, reciting these and other facts, sold, released, &c., "in consideration of the premises" his real and personal estate to Mr. Johnson, who also executed the deed as a party, and who, by the terms expressed in the deed, was to take absolute possession, which was not postponed for a moment.

Among other trusts declared by the deed, was that of paying the debts to Johnson himself out of the estate conveyed, and a power of sale was given him. A family settlement of the residue after the death of the grantor is provided for, and the instrument in several places assumes a testamentary character; it disposes of the residue after his death, as just mentioned; it speaks of his age and infirmities and appoints Mr. Johnson his executor. It is clear that Mr. Thompson intended and undertook more than he could legally accomplish; for he had already made a deed and conveyed to the grantee a present interest in the property, with the clear legal title, and throughout the instrument Mr. Thompson's intention that it should take effect in his life-time appears. Bonds in his name were to be executed by Mr. Johnson, who was also to furnish him a support out of the estate. It was an act *inter vivos* obviously, and not a will. It was not the intention or the effect of the instrument to postpone Mr. Johnson's indemnity as long as the grantor might live, which might have been ten or fifteen years or more. The instrument in truth, could have had no effect as a will, in respect of the lands, for the want of the necessary number of witnesses.

Let the decree of the Probate Court be reversed.

SMITH & GAREY *vs.* AWBREY.

1. The appellate court will not reverse on account of an error, when the record clearly shows that no injury resulted from it to the plaintiff in error.

(CHILTON, J., dissenting, held that the appellate court should reverse in favor of a party, against whom the court below has improperly overruled a demurrer to the declaration, although it may appear from the evidence set out in the record, that the plaintiff was entitled to recover under counts which are unobjectionable.)

2. If the owner of a promissory note give it up to one of the makers, with the understanding that another note is to be executed in its stead, this will not discharge either one of the makers.

ERROR to the Circuit Court of Perry. Tried before the Hon. John D. Phelan.

THIS was an action of assumpsit, instituted by Awbrey against the plaintiffs in error, on a promissory note alleged to have been lost, affidavit being made of the loss under the statute. The declaration contained a special count on the note and the common counts. The defendants demurred to the special count, and their demurrer being overruled, pleaded the general issue, on which a verdict was rendered against them.

It was shown in evidence, that the plaintiff had given up the note to Smith, because it was written with pale ink and he could not read it well, with the understanding that Smith should execute a new note in its stead, with the same or with other security, and that it was destroyed accidentally while in his possession.

The defendant Garey asked the court to charge the jury, in substance, that upon this evidence the plaintiff could not recover, as against him, either under the special count, or the common counts, which charge the court refused to give, and the defendant excepted.

A. B. MOORE, for plaintiffs in error:

1. The declaration is demurrable as to the first count:

Because of uncertainty.—1 Ala. 452.

Because the declaration alleges that the note upon which the suit is founded is lost, but does not state that an affidavit was made before the institution of the suit, of such loss.

Because the declaration is not verified by affidavit—see Clay's Dig., 333, § 112; Bell, use, v. Moore, 9 Ala. 823.

2. The affidavit of the loss of the note should have been made before the suit was commenced, and cannot be made afterwards. Clay's Dig. 382, § 9; Posey & Coffee v. Bank, 12 Ala. 802. In this case the writ was issued on the 10th Jan. 1849, and affidavit was made on the 9th Feb. 1849.

3. Under the common counts in the declaration no recovery can be had upon a lost note, unless the amount of the note is proved with certainty, and unless it is also proved that the note or bill lost is so lost or destroyed that the defendant can never again be called on to pay it.—13 Ala. 544; Greenl. Ev. 131.

The delivery of the note to the principal, as shown in the bill of exceptions, was a discharge of Garey, his security, who is the party defending, and the court should have given the first charge asked by defendant below, to the jury.—Story on Con., § 870; McKay & McDonol v. McKay, 5 Ala. 388.

John, *contra:*

1. The declaration is sufficiently certain in the description of the note—a certain day is stated as the date, (which need not be,) and the day it fell due is certainly and truly stated.

2. The special count is sufficient upon a lost instrument in a suit at common law, and it was not necessary that the plaintiff should make an affidavit before bringing a suit which may be sustained at common law. It is only in cases where the court cannot take jurisdiction that the affidavit is necessary; and if the jurisdiction of the court depends upon the affidavit, it must be made before the suit is commenced.

3. The Statute of 1823, (Clay's Dig. 333, § 112,) does not apply to a case of this character. At common law no affidavit was required. The statute was not intended to change the rules of pleading, except as to suits upon such lost instrument as did not authorise a suit at common law.

4. But admit that the special count is insufficient, there is in this case the usual common counts, and the testimony as set out shows that the plaintiff was entitled to recover under the common counts in the declaration.—2 Greenl. Ev. 130, § 156; Chaudron v. Hunt & Norriss, 3 Stew. 31; Branch B'k at Mobile v. Tillman, 12 Ala. 214; Bank of Mobile v. Williams, 13 ib. 544;

Posey & Coffee, ex'rs, v. Decatur Bank, 12 ib. 802; Pintard v. Thackington, 10 Johns. 104-7; Eagle Bank v. Smith, 5 Conn. 71; Clay's Dig. 326, § 66, and 381, § 6.

5. The reason no recovery can be had at common law on negotiable instruments when lost, is, that the maker may be compelled to pay again to the holder. That reason does not exist in this case; because it is very clear from the evidence that the note was totally distroyed while in the possession of R. Smith, after it had been executed and delivered by Smith & Garey to Awbrey—hence the common law jurisdiction is clear.

6. The fact that Awbrey delivered the note to Smith, that a new note might be written and signed by him and Garey in a more legible hand, cannot effect the right to a recovory. The liability of Smith & Garey was not released—such was not the intention of either of the parties, nor was it the effect of what they did. The fact that Smith held evidence of indebtedness in his own hands for the purpose proven, did not discharge the debt nor release either of the makers from liability.

7. The note while in existence was but the evidence of the liability of the makers to the payee, and not the liability itself, and neither the change of possession nor the destruction as proven could destroy the liability. Therefore secondary evidence of the indebtedness could be given under the common counts after establishing the loss, and if sufficient, as it clearly is in this case, the plaintiff should have recovered even if there had been no special count, or if the demurrer had been sustained to the special count.

8. The judgment in this case effects the proper result, and will not be reversed for errors which did not injure the plaintiff in error.—Ledbetter v. Castles et al., 11 Ala. 149; Shehan v. Hampton, 8 ib. 942.

9. The defendant had the benefit of all the grounds of defence to which he was entitled, and therefore the judgment should not be reversed.

PARSONS, J.—We do not find it necessary to determine whether the first count in the declaration was good or not. There was a demurrer to it, which was overruled; and if the count was bad there was error, certainly, in overruling the demurrer. But if this were a harmless error, an error which really injured no one, it is according to the established course of this court not to

reverse for it. In this view of the case, the only difficulty is in reconciling this with the case of Porter v. Nash, 1 Ala. 452. In that case there was a special count on a lost promissory note, and the common money counts. The defendant demurred to the special count and pleaded in bar to the others. The demurrer was overruled below, erroneously, as this court held, and therefore the judgment was reversed.

If it did not clearly appear in that case, that the defendant below was not injured by the error, then that case is distinguishable from this. In this case it appears clearly that if the demurrer had been sustained, or the count never filed, the plaintiff below should have recovered, under his other counts, the precise sum which he did recover. I therefore think the judgment should not be reversed; and in this I am sustained, I think, by the principle of several decisions of this court, since the case of Porter v. Nash. It has been determined that although a demurrer to a plea was improperly sustained, yet as it appeared that the defendant had the benefit of the facts stated in it under another plea, he could not insist on the error, as no real injury was done him.—4 Ala. 230; 8 ib. 161; 3 ib. 942; 17 ib. 699. It is not necessary now to determine how far Porter v. Nash, and Bell v. Moore, 9 Ala. 823, are consistent, in other respects, with the Branch Bank at Mobile v. Tillman, 12 ib. 214; 17 ib. 813, and the Bank of Mobile v. Williams, 13 ib. 546, in which I fully concur. The cases in 13 ib. 545, and 1 ib. 454, show that in this case the plaintiff below could recover upon the common counts, as his note was destroyed.

The owner of the note gave it to one of the makers to the end that another note might be made, which was not done. We are entirely satisfied that this did not discharge either of the makers; and we are satisfied that there is no injurious error in the charge of the Circuit Court.

The judgment is affirmed.

CHILTON, J.—I do not think that we are relieved from investigating the sufficiency of the first count in this declaration, upon the ground that the evidence set out in the bill of exceptions clearly shows that the plaintiff is entitled to recover under the common counts, to the same extent which he seeks to recover upon the first, which is a special count. In the first place, the

bill of exceptions does not state that the evidence set out in it is all that was offered, so that for this reason, we cannot undertake to say that the defendant below has not sustained any injury. In the second place, if the demurrer was improperly overruled to the count and judgment had been taken upon it for the refusal of the defendant to plead over, he would clearly have been entitled to a reversal; his pleading over is no waiver of any matter covered by the demurrer, but the statute expressly reserves to him in such case the right to assign the overruling of the demurrer for error.—Clay's Dig. 334, § 121. In the last place, conceding the doctrine that the party can take no advantage of an error which works no injury to him, yet I hold that we must infer the party was injured, as a legal deduction, where he is forced to trial upon an insufficient declaration to which he properly demurred, but which demurrer was overruled. The cases are exceedingly numerous which hold that judgment should not be set aside, on account of charges of the court admitting testimony and overruling pleas, when no injury did or could result to the party; so also where from the whole record it is manifest a party can never succeed, he may not reverse; but I have found no case in our reports, nor have I ever met with one which holds that the appellate court will not reverse in favor of a party, as against whom the court has improperly overruled the demurrer to the declaration, because it may appear from the evidence that the plaintiff was entitled to recover under counts which are unobjectionable. I am reluctant at all times to differ from my brethren, but as I think the reasoning of the opinion and the ground upon which it is rested make a new application of the doctrine that the absence of injury renders error unavailing, and perhaps will lead to consequences not easily foreseen, I feel constrained to record my dissent.

ALLEN & WIFE *vs.* RANEY & WIFE.

1. Neither commissioners who are appointed to make distribution of an estate, nor the Orphans' Court, have authority or jurisdiction to require one distributee to pay a sum of money to another, and such a decree, whether made by the commissioners only, or confirmed by the Orphans' Court, will not sustain an action of debt for the recovery of the money.
2. But if the parties adopted the division, with its terms, as made by the commissioners, and acted on it, or made distribution among themselves upon the same terms, they would be bound by it.

ERROR to the Circuit Court of Limestone. Tried before the Hon. Thomas A. Walker.

THIS was an action of debt, instituted by the plaintiffs against the defendants in error to recover a sum of money, which had been decreed by the commissioners who were appointed to make distribution of the estate of A. H. McKinney deceased, to be paid to Mrs. Allen (then Mrs. McKinney,) the widow of the deceased, by Mrs. Raney (then Susan McKinney,) one of the distributees of the deceased. The declaration contained two counts. The first set out the order of the Orphans' Court, appointing the commissioners to make distribution of said estate, the proceedings and decree of said commissioners, and their return to the court, and averred that their decree had been recorded in said court, and was in full force, unreversed and unsatisfied.

The second count averred an indebtedness from Mrs. Raney to Mrs. Allen, for a "balance found due the said Sarah J. Allen, on a division of the personal estate of said decedent, and to be paid to the said Sarah J. Allen, by the said Susan Raney, then Susan McKinney, (who then and there received her portion of said estate, thus allotted her,) one of the legatees of said decedent, when she, the said Susan, should be thereunto afterwards requested." The defendants put in a general demurrer to each count, which was sustained by the court. Judgment was rendered in favor of the defendants, and the plaintiffs bring the case into this court, and assign as error the ruling of the court sustaining the demurrers.

E. J. Jones, for plaintiffs:

1. An action of debt will lie on an order of the County Court, directing the payment of money, which does not appear from inspection to be void.—Morrison v. Morrison, 3 Stw. 447.

2. An order of the Orphans' Court may be entitled to the dignity of a record, and may be the foundation of an action of debt, though an execution could not issue on it.—Morrison v. Morrison, 3 Stw. 447.

3. The orders of the Orphans' Court are assimilated to judgments, and conclude all previous irregularities.—Wyman v. Campbell, 6 Port. 238.

4. Judgments of law courts, decrees in chancery, and orders of Orphans' Courts, if not founded in an usurpation of authority, are conclusive till reversed.—Morrison v. Morrison, 3 Stw. 447; Wyman v. Campbell, 6 Por. 242; Perkins v. Winter, 7 Ala. 864.

5. Within three months after estate is reported solvent, court shall make an order of distribution.—Clay's Dig. 196, § 22. In this case the administrator applied for the order.

6. The jurisdiction being shown, the order is conclusive on parties, and privies, though it abound in irregularities which would authorize a revising court to reverse it.—Wyman v. Campbell, 6 Por. 236; Doe. ex dem. Duval's heirs v. McLosky, 1 Ala. 732; Perkins v. Winter, 7 Ala. 864; Moore v. Clay, 7 Ala. 752; Morrison v. Morrison, 3 Stw. 447.

7. The omission of the names of the heirs in a proceeding to sell the land of a deceased, will not render the proceedings void. Duval v. McLoskey, 1 Ala. 732.

8. The jurisdiction of the court being shown, every intendment is to be made in favor of the judgment of the court.—Key v. Vaughn, 15 Ala. 499.

9. If the first count be wrong, the second is conceived to be good beyond question.—See Chit. Plead. vol. 2, 384; 2 Greenl. Ev. 233.

R. C. Brickell, *contra:*

1. The demurrer was properly sustained. If the decree or order declared upon is to be regarded as the action of the Orphans' Court, it is void. The Orphans' Court had no power to render decrees against distributees.—Duval v. Chaudron, 10

Ala. 391; Jones & Conner v. Jemison & Stewart, 4 Ala. 632; Teat v. Lee, adm'r., 8 Por. 507.

2. If it is to be regarded as the action of the commissioners, it is void. The power conferred upon them by statute, is to make division of the estate. Beyond this, they have no powers. If the power to equalise a division, when the estate is not susceptible of an equal division, by requiring one distributee to receive property, greater in value than his distributive share, and to become chargeable to his co-distributees for the excess, be conceded to the commissioners, then the last clause of the statute is useless.—Clay's Dig. 196, § 22. For, if this can be done, in no case would a sale be necessary. The last clause of the statute cited, is as follows: "*Provided always*, That when such division and distribution cannot be equitably effected without manifest injury to the legatees, or other legal representatives, in that case, such estate shall be exposed to public sale as heretofore." What is meant by "equitably effected without manifest injury to the legatees or other legal representatives." Clearly, that the division of the estate itself shall be so effected, as not to give one distributee a larger share than another, (Teat v. Lee, adm'r., 8 Por. 507;) and if the division cannot be effected without doing this, then the property must be sold.

3. The Orphans' Court being the creature of the statute, and not proceeding according to the course of the common law, is confined strictly to the powers given it, and can take nothing by implication.—Leavens v. Butler et al., 8 Por. 380; 4 Phillips on Evidence, (Cowen and Hill's notes,) 180.

4. The case of Morrison v. Morrison, 5 Stw. 444, was relied on by the plaintiffs in error in the court below. In that case, the Orphans' Court decreed to the creditor of an insolvent estate his rateable share, and an action of debt was instituted on the decree and sustained.

The statute then in force, in reference to insolvent estates, authorized the Orphans' Court to apportion them among the creditors, and declared that after the apportionment, the administrators should be liable to creditors for their respective shares.—Laws of Ala. 329, § 33.

PARSONS, J.—The commissioners divided the estate, so as

to require payments in money from some of the legatees to others, for the purpose of equalizing the shares.

The first count states the indebtedness to have arisen solely out of this, and the plaintiffs' object was to recover one of the sums awarded by the commissioners. Resting this claim upon the decision of the commissioners, or considering that as having been confirmed by the Orphans' Court, the result must be the same; for, in either case, we can not hold that the commissioners alone, or they and the Orphans' Court, could divide and distribute the estate upon that principle, without departing from what has been fully settled in this court. It results from the cases of Teat v. Lee, adm'r. 8 Por. 507; Jones & Conner v. Jemison & Stewart, 4 Ala. 633; and Duval v. Chaudron, 10 Ala. 391; that neither the commissioners, nor the Orphans' Court, had authority or jurisdiction to require one of those parties to pay a sum of money to another, but if an equal division could not be made otherwise, a sale for that purpose might have been made under the statute.—Clay's Dig. 196, § 22. The first count was defective.

2. But if the parties adopted the division with its terms, as made by the commissioners, and acted on it, or made distribution upon the same terms among themselves, they were bound by it. And the second count, we think, was sufficient for such a cause of action. Debt lies to recover money due upon simple contracts express or implied, and whether verbal or written.—1 Chit. Plead. 108. The second count is not drawn with technical accuracy, but it is not so defective in substance, as to be liable to a general demurrer under our statute. For the error in sustaining the demurrer to the second count, the judgment is reversed, and the cause remanded.

BROOKS *vs.* KIRBY.

1. A certiorari does not lie to review the sentence of the Commissioners' Court, refusing to establish a private road.
2. Whether a mandamus from the Circuit Court would not lie, to require the Commissioners' Court to proceed and exercise its discretion, when the record shows that its action was not predicated upon the facts, as they might have been made to appear, but, upon a supposed legal insufficiency of the petition, which induced the court to repudiate the application.—QUERE?

ERROR to the Circuit Court of Tuskaloosa. Tried before the Hon. John D. Phelan.

DANIEL O. BROOKS petitioned the Commissioners' Court of Tuskaloosa, for the establishment of a private road across an enclosure in the occupancy of John Kirby. He alleged in his petition, that he owned lands on each side of said enclosure; that he, and those under whom he claimed, had used a right of way across the enclosure for twenty years, during which time it had been waste and unoccupied land; that Kirby had recently purchased and enclosed it, and thereby subjected petitioner to great trouble and inconvenience. Kirby contested the application, and demurred to the petition. The Commissioners' Court sustained the demurrer, and refused the prayer of the petition. The case was removed into the Circuit Court, by certiorari, where the judgment of the Commissioners' Court was affirmed, and the case is brought to this court by writ of error.

E. W. PECK, for plaintiff in error:

1. Do the facts stated in the petition entitle the plaintiff to a private way in this case?

The statute above referred to authorizes the court of roads and revenue in each county on the application of any one or more persons to grant and establish private roads, not exceeding fifteen feet wide. This is not a mere discretionary power, that the court may or may not exercise. They are bound to receive, entertain an application under the act, and in a proper case grant and establish the road prayed for. The only prohibitions in the act is, that such roads shall not be opened through any

one's plantation. The court below refused the application of the plaintiff, because the contestant had run a fence around the strip of land through which the road was sought to be established. There is no fact stated in the petition that shows that the road, if granted, would run through contestant's plantation. The word plantation employed in the act means something more than enclosure; a party by running a fence around or across a piece of wood land, cannot defeat an application for a private way. By plantation, here, the Legislature did not mean all the land that a party might own, but merely the cultivated or improved part thereof.

Here the plaintiff and those under whom he claimed had been accustomed for twenty years and more, to the use of a way across this land. It was open and without obstruction; there was therefore no necessity for this application, until the contestant run his fence around it, and it will be worse than mockery to say that the plaintiff is to be utterly shut out from the use and enjoyment of his farm, because a capricious or unfriendly neighbor has seen fit to build a fence in his way, before the application was actually made.

FRIERSON, *contra:*

By reference to the record, you will find the petition filed in the court of roads and revenue, which embodies the facts as briefly as I could possibly condense them here.

Upon these facts, I call your attention to the following points:

1st. That a party interested can appear, and upon application make himself a party to the suit, on an application for a private way.—Moore v. Hancock, 11 Ala. 245; 15 Ala. 54.

2nd. That when Kirby made himself a party to the suit, it was then purely a private suit between the parties, involving private interests alone, and the court will decide upon the rights of the parties according to the facts presented.—Jones *ex parte*. 1 Ala. 15.

3rd. That Brooks has shown that he was entitled to his way as a matter of sheer justice; that he and those under whom he held, had been in the undisturbed possession and use of said way, "time out of mind." This would be equivalent to twenty years possession, which, of itself, would make plaintiff's right of way perfect.—See Am. Com. Law cases, 8th vol. 391; also, 2 Hill, S. C. 641.

4th. The statute was intended to reach and cover this very case. The plaintiff, at common law, had his rights clearly defined, and the remedy pointed out. The design and intention of the Legislature was not to enlarge his rights, but to give a more summary remedy than that given by the common law. If the statute was remedial in its character, and it certainly was so designed, it could not very well apply in any other case. The object of the Legislature was to give a summary remedy to every citizen, by which he could have free ingress and egress, not only to his court house and church, but to his farm; and it never was intended, that this remedy given by the statute could be taken away by the act of a captious or malicious neighbor, or by the fact of the party, by long use, having matured his inchoate right into a perfect one. The Legislature must have intended the remedy for this class of cases, and if so, the County Court should have taken jurisdiction, and passed upon the rights of the parties; and the superior court will correct their error.

It would be well to illustrate my idea by a reference to the fact, that there are now numerous persons who own and cultivate river bottom land, all having one way to go into their farms, or perhaps each having different ways to enter their river farm from the uplands.

Suppose then, that some malicious neighbor should conclude to fence out all or any one of his neighbors from ingress to his farm; would he be driven to the tardy remedy of the common law; or did not the Legislature intend to reach this case.—See Singleton v. Com. Roads, 2 N. & McC. 526.

CHILTON, J.—It was early decided by this court, that no appeal or writ of error would lie from the Commissioners' Court of roads and revenue, to the Circuit or Supreme Court.—Ricks v. Hall, 4 Por. 178; Tarleton, *ex parte*, 2 Ala. 35; Hill v. Bridges, 6 Por. 197; but if the Commissioners' Court proceeds to lay out a road to the injury of a party, the person so aggrieved has his remedy by *certiorari* to the Circuit Court, and by writ of error from that court to this.—Commissioners' Talladega Co. v. Thompson, 15 Ala. 134; Barnett v. The State, ib. 829. So also, when that court, in a proper case for its action, refuses to act, it may be required to proceed by *manda-*

mus issued from the Circuit Court, from which court a writ of error will lie to this.—State *ex rel.* Driver v. The Commissioners' Court Roads & Rev. of Talladega Co., 3 Por. 412. But the court awarding the *mandamus* cannot prescribe the judgment to be rendered, in cases where the inferior court is invested with a discretion. It can only be required to exercise its discretion. Cuthbert *et al.* v. Lewis, 6 Ala. 268.

In the matter of establishing roads, &c., and granting ways to private individuals, the Legislature has invested the Commissioners' Court with enlarged discretionary powers, and from the very nature of the proceedings, and the constitution of the court, when it acts, and its decision rejecting an application, predicated upon the evidence and the considerations of convenience and public necessity which may properly influence it, we do not see how it is to be controlled by any other court. It is made the exclusive judge of the weight of the evidence, of the necessity which exists for the proposed road, &c., and of the inconvenience which may result from its establishment. Its members may be well acquainted with all the facts, and may predicate their action upon their personal knowledge of those facts, which the record would not disclose. All this but proves that so long as the action of the court does not invade private rights illegally, no one has a right to revise or call in question its decisions made in the exercise of its discretionary powers. The cases in 15 Ala. above cited, and Long v. The Commissioners' Court of Butler, at the last term, were all cases in which the court had established roads, and the parties whose rights were injuriously affected sought to quash the proceedings for illegality upon their face. We have been unable to find any case where a *certiorari* has been awarded to reverse the decision of the Commissioners' Court, in refusing to establish a road, or to grant the prayer of such petitions.

We think that it was the duty of the Commissioners' Court to have proceeded on this petition, and to have investigated and determined upon the merits of the proposed right of way, in view of all the facts and circumstances which could have been adduced before it. We are of opinion also, that the court should have disregarded the demurrer, as withdrawing from it the discretion with which the Legislature has invested it over the subject matter of the petition, and as a proceeding never contemplat-

ed by the statute. Nor are we prepared to say that a *mandamus* would not lie from the Circuit Court in the case before us, to require the Commissioners' Court to proceed and exercise its discretion, since the record shows that its action was not predicated upon the facts as they might have been made to appear, but upon the supposed legal insufficiency of the petition, which induced the court to repudiate the application, upon the mistaken idea perhaps, that a simple enclosure of waste lands would constitute a "plantation" in the sense in which that term is used in the act. We will, however, leave this an open question; all we now decide is, that the sentence of the Commissioners' Court of roads and revenue, refusing to establish the private road petitioned for, cannot be reviewed on *certiorari*.

The proceedings in the Circuit Court were *coram non judice*, and the writ of error to this court must be dismissed.

McLEMORE, Adm'r, *vs.* BENBOW.

1. When an execution has been levied on property and bond given to try the right thereto in conformity with the statute, a second levy under a junior execution cannot be made on the same property before the claim is disposed of.
2. In such case, the court will on motion set aside the second levy, even before the return of the execution.

Error to the Circuit Court of Montgomery. Tried before the Hon. Robert Dougherty.

Belser & Harris, for plaintiff in error:

1. The execution not having been returned to court, the court had no jurisdiction of it, and could make no order touching or concerning it. The court will not interfere on motion to prevent the sheriff from selling, but the party having title has his remedy by action.—Hewson v. Deggert, 8 Johns. 333.

2. The property being of greater value than the amount of the execution levied on it, if it was in fact the property of the de-

fendant, he had an interest in the surplus; and the surplus belonging to the defendant in execution, McLemore had the right to apply that surplus to his execution, and he could only do so by levying his execution on it.

T. WILLIAMS, *contra:*

1. Property levied on and claimed by a third person, pending such issue, the property so levied on is not subject to levy under another execution.—Kemp & Buckly v. Porter, 7 Ala. 138, and see Langdon & Co. v. Brumby, adm'r, 7 ib. 53, where plea of former levy, &c. not good.

2. Property levied on and trial of right pending, chancery will interfere by injunction and stop second levy on same property.—Huntington v. Bell, 2 Port. 51.

3. But the court possess a controlling power over the acts of their officers, and if a sheriff is guilty of irregularity in his proceedings upon an execution, to the prejudice of either party, or a third person, the court will either set aside or correct the act complained of.—Mobile Cotton Press v. Moore & McGee, 7 Por. 687.

DARGAN, C. J.—An execution was issued in favor of William H. Ogbourne against James K. Pinckston, on the 22d day of April, 1850, for five hundred dollars, besides cost, and was levied on a slave named Bill, as the property of Pinckston. Benbow interposed a claim to the slave as his, and gave bond according to the statute to try the right of property. On the first day of November, 1850, two other executions were issued against Pinckston in favor of McLemore, and were levied on the fifth day of November, 1850, on the same slave, the claim of Benbow being then pending and undisposed of. The two executions in favor of McLemore were returnable to the Spring Term of the Circuit Court, 1851. At the November Term, however, after the second levies were made, Benbow moved the court to set them aside, which motion was granted, and to reverse this judgment setting aside the second levies, McLemore brings a writ of error to this court.

We admit that the court will not interpose in this summary way and set aside an execution when it has been levied by the sheriff on the property of one, who is a stranger to the writ, but

will leave the party aggrieved by the act of the sheriff to his remedy, and the case of Hewson v. Deggert, 8 Johns. 267, is an authority to this point. But it must be considered as the settled law in this State, that when an execution is levied on property and a bond is given to try the right thereto in conformity with the statute, a second levy under a junior execution cannot be made upon the same property before the claim is disposed of.—Langdon & Co. v. Brumby, 7 Ala. 138; Kemp & Buckly v. Porter, 7 ib. 53. The reason of this is, that the property, although in fact in the possession of the claimant, is nevertheless considered as in the custody of the law; the courts therefore will not permit it to be taken from the claimant by a junior execution, and thus deprive him of the power to deliver the property in conformity with the condition of the bond. But it is urged that the court cannot act upon the matter until the execution is returned, but we see no reason for this; the property being considered as in the custody of the law, the court may control its own officers from improperly levying upon it, whether the execution is returned or not.

We do not perceive any error in the action of the court, and the judgment must be affirmed.

BARRON, Adm'r, *vs.* TART.

1. A *scire facias* to revive a judgment, as to costs, against an administrator, the damages having been paid, is sufficient if it substantially describes the judgment, although it does not state the amount of the costs.

Error to the County Court of Perry.

Hugh Davis, for plaintiff in error.

A. B. Moore, *contra:*

There was no error in overruling the demurrer of defendant to plaintiff's *sci. fa.*, as it contains every thing necessary to be set out in a declaration.—See Harris' Entries, 465—see *sci. fa.*

The plaintiff below had the same right to recover his costs that he had to recover his debt. If this be true, then he had as much right to revive as to the costs, as to the debt itself; otherwise the executor or administrator might pay off a judgment before a revivor, for the purpose of avoiding the payment of the costs, and thus defeat the plaintiff's judgment for his costs.

A *sci. fa.* to revive a judgment against an executor is but a continuance of the former suit.—See 2 Dunl. Prac. 1107.

The judgment in the former suit being set out "*in hæc verba*" in the *sci. fa.*—the death of the defendant since the rendition of said judgment, and the fact that John Barron is the administrator of said deceased, being clearly and distinctly stated, is all that can be required in such a proceeding. The judgment is in proper form. The amount of costs in the former judgment need not be inserted in the entry reviving said judgment.—See form of such a judgment, 2 Lilly's Ent. 397-8; 2 Har. Ent. 363.

But if the judgment was incomplete because the amount of costs of the former judgment was not inserted, it is not an error of the court, but a mere clerical error, which might be amended at any subsequent term of the court; and not being an error of the court, this court will not revise it.—See Clay's Dig. 322, § 54—see Wilkerson v. Goldthwait, 1 Port. 167.

PARSONS, J.—The *sci. fa.* required the plaintiff in error to appear and show cause why the judgment against his intestate should not be revived, as to the costs, against him as administrator, &c., the damages having been paid—and the court awarded execution for the costs in the usual form against an administrator. As the *sci. fa.* stated all the matters of substance, there was no error in overruling the demurrer. The *sci. fa.* did not state the amount of the costs, but the judgment was otherwise substantially described, which was sufficient. The *sci. fa.* was but a continuation of the former suit, and the execution awarded can only issue for the costs that were recovered, the amount of which is never, in our practice, stated in the judgment, but they are taxed by the clerk, and if he should commit an error, the remedy is easy. The judgment is affirmed.

LEVERETT'S HEIRS *vs.* CARLISLE, Ex'r.

1. It is not necessary that the subscribing witnesses to a will should be informed of its contents.
2. To constitute undue influence, some act or acts must have been done to cause the testatrix to dispose of her property contrary to her desire.
3. When the court refuses to give a charge requested, the party wishing to revise such refusal must set out in his bill of exceptions so much of the evidence as will show that the charge requested was pertinent to the evidence, and was not abstract.

Error to the Probate Court of Chambers.

Carlisle propounded for probate the last will and testament of Mary G. Leverett, deceased, which was contested by some of her heirs at law, on the ground of its having been obtained by undue influence. The question was submitted to a jury, who decided in favor of the validity of the will, and it was thereupon admitted to probate by the court.

A bill of exceptions was taken on the trial, from which it appears, that the contestants requested the court to charge the jury, that if they believed from the evidence that the subscribing witnesses to the will were not informed of its contents, when they signed it as witnesses, they must find against the will; which charge the court refused, and charged the jury, that if the testatrix knew what was written in it, it was not material whether the witnesses knew it or not. The contestants also asked the court to charge, that any trick, artifice, cunning or management, whereby the testatrix was induced to make her will disposing of her property in a different manner from what she otherwise would have done, although she acted willingly at the time, yet this would be undue influence in the eye of the law, and would vitiate the will, which charge also was refused. The court charged the jury, that to constitute undue influence, some act or acts must be done to cause testatrix to dispose of her property contrary to her own desire.

The contestants excepted to the charges given, and to the refusal to give the charges asked, and now assign them as error.

Brock, for plaintiffs in error:

The record shows these facts: The will was written at the house of defendant in error; it is in his hand writing; his wife is the principal beneficiary of the will; testatrix, when the will was executed, was 76 years of age; she was then, and had been for two years, living with defendant in error. There was no proof that she knew the contents of the will.

The first charge asked by plaintiff in error should have been given.—1 Wms. on Ex. 219; Hill v. Barge, 12 Ala. 687. A party has a right to have a proper charge given in the terms in which it is asked.—13 ib. 222.

The court erred in the charge given and the charge refused, as to undue influence. By the charge given, the "desire" of the testatrix at the time of executing the will, settled the question of undue influence. But a will may be avoided for undue influence, although at the time of its execution the testatrix acted willingly, having been led to that willingness by artful flattery or misrepresentation, &c.—Roberts, ex'r, v. Trawick, 17 Ala. 55; Coleman v. Robertson's Ex'rs, 17 ib. 84.

No counsel for the defendant.

DARGAN, C. J.—The first instructions given by the court to the jury are entirely correct. The witnesses need not know the contents of the will they are called upon to subscribe as witnesses, and very seldom, if ever, are informed of its contents. That the testatrix knew its contents and that it contained her wishes respecting her property after her death, is all that the law ever has required.

2. The second charge is equally free from error. Undue influence in procuring a will to be made, by which the testator disposes of his property in a manner different from what he would have done, had no improper influence been exercised over him, is sufficient reason for setting aside the will; but this undue influence must result from the acts and conduct of the party supposed to have exercised it. It is but the effect of his acts and conduct which is the cause. If the cause does not exist, the effect cannot. The court therefore properly instructed the jury, that to constitute undue influence some act or acts must have been done to cause the testatrix to dispose of her property contrary to her desire.

3. It is very true that trick, artifice or management which induces one to dispose of his property contrary to his wishes, will vitiate the will; and if there had been any evidence tending to show that Greene W. Carlisle had resorted to any trick, artifice or management to induce the testatrix to make the will propounded for probate, the charge requested should have been given. But if there be no evidence before the jury to base a charge upon, the court should not give it, although as an abstract principle of law it may be free from objections. This is a well settled principle; consequently we have invariably held that where a charge is refused to be given, the party wishing to revise such refusal must set out in his bill of exceptions so much of the evidence as will show that the charge requested was pertinent to the evidence, and was not abstract.—Hughes v. Parker, 1 Port. 139; Hollinger v. Smith, 4 Ala. 367; McGehee v. Powell, 8 ib. 828; Milton v. Rowland, 11 ib. 733. We cannot percieve the slightest evidence tending to prove that Carlisle resorted to any trick, artifice or management to induce the testatrix to make the will she did, or that the will did not fully and completely contain the wishes of the testatrix respecting the disposition of her property after her death.

There was no error, under these circumstances, in refusing to give the instructions asked, and the judgment of the Court of Probate must be affirmed.

BEAVERS *et als. vs.* DAVIS.

1. When service of process upon non-resident defendants has been perfected by publication only, the record must show that the publication was made in the manner pointed out by the 40th Rule of Chancery Practice.
2. When the interest of an absent defendant is affected by the decree, and he has not been personally served with process of *subpœna* within this State, nor voluntarily submitted to the jurisdiction of the court, it is erroneous to render a final decree without the bond required by the Act of 1805.—(Clay's Dig. 353, § 45.)

Error to the Chancery Court of Shelby. Tried before the Hon. W. W. Mason.

Bennett Davis filed his bill against Beavers, Dunn *et als.*, in which he alleged that in 1841, he purchased a slave at sheriff's sale, (sold under execution against Solomon Dunn,) and paid full value for him, believing the title to be good; in 1845, Josiah Dunn, Archibald Dunn, and Parker and wife brought their action of detinue against him for the slave, claiming title under the will of one Benton; after a trial in the court below, the case was taken to the Supreme Court, where it was held, that said will conferred such a title upon plaintiffs, as would enable them to sustain their said action at law; afterwards, complainant, in ignorance of the existence of any facts which would enable him to defeat said suit, made a compromise with plaintiffs, by which he agreed to let judgment go against him for the negro and costs of suit, which was accordingly done; after which complainant delivered up said negro to said plaintiffs, who sold him for six hundred dollars; after the rendition of said judgment, and the surrender of said negro, complainant discovered that said Solomon Dunn had executed to said plaintiffs a conveyance of eight or nine negroes, which purported to be founded upon a money consideration, but complainant charged, that the true and only object and intent of the instrument was to indemnify said plaintiffs for said negro already spoken of, and three or four others which had been sold under execution against said Solomon Dunn, and that no other consideration passed between the parties thereto; and that said negroes conveyed thereby had been accepted by said plaintiffs in full satisfaction for those sold under execution as aforesaid. Said plaintiffs were all non-residents, and one Beavers, who is made a defendant to the bill, was alleged to be indebted to them in the sum of five hundred dollars.

The prayer of the bill is, that said plaintiffs be decreed to pay to complainant said sum of six hundred dollars, the amount for which they sold said negro, and that said debt due from Beavers to them be attached in his hands, and condemned to the satisfaction of complainant's demand. The Chancellor decreed according to the prayer of the bill, without requiring the bond prescribed by the statute in cases where non-resident defendants are affected by the decree. The errors assigned are—1st, in

not dismissing the bill for want of equity; 2nd, in rendering a final decree without proof of publication having been made against the non-resident defendants; and 3rd, in not requiring complainant to execute a bond for the indemnity of the non-resident defendants.

RICE & MORGAN, for plaintiffs in error:

1. The bill is devoid of equity; it is nothing more in its effect, than a bill for a new trial; although the prayer, and the relief granted, go to the extent of giving a specific lien on a debt in the hands of Beavers. The facts newly discovered by complainant, are not in their nature an equitable defence to the suit, which Davis could not have relied on in a court of law, but a purely legal defence.—Pharr & Beck v. Reynolds, 3 Ala. 521.

2. The compromise of the case at law would prevent equitable relief to Davis, because it does not appear that any fraud was used to prevent Davis from informing himself fully in respect to his means of defence, or to prevent him from defending himself in any manner; such a compromise would have supported a promise to pay from Davis to Dunn.—See Camp. v. Nabors, 14 Ala. 460; Lee & Norton v. Ins. Bk. Colum. 2 Ala. 21; Stinnett v. Br. Bk. 9 Ala. 120; Gov. v. Barrow, 13 Ala. 540.

3. There was no proof of publication in the case, and the defendants are non-residents.

4. Those who have a real interest in the cause are all non-residents; no statutory bond is required by the decree, nor executed in the case.—Butler v. Butler, 11 Ala. 688.

No counsel for defendant.

DARGAN, C. J.—Without entering into a particular statement of the facts alleged in the bill, we deem it sufficient to say that it contains equity, and is properly filed under the act of the 5th of February, 1846. But as Josiah Dunn, Archibald Dunn and James Parker and wife, are non-resident defendants, and have not answered the bill, and service upon them has been perfected by publication only, to sustain the decree, the record must show that the publication was made in the manner pointed out by the 40th rule of our chancery practice. We have held that if the decree itself showed that proof was made of those

facts required to perfect the service, we would not reverse, because the evidence itself was not contained in the record; but when the evidence itself is not contained in the record, and the recitals in the decree do not show that such proof was made, the decree cannot be sustained.—Hartley v. Bloodgood, 16 Ala. 233. The record in this case neither contains the evidence of publication, nor does the decree shows that evidence of the facts necessary to constitute good service was adduced in the court below.

2d. The chanceller also erred in proceeding to a final decree without requiring of the complainant to give bond, touching the restitution of the money sought by the bill to be recovered, should the absent defendants appear and petition the court to have the cause reheard. We have invariably held, that when the interest of an absent defendant is affected by the decree, and he has not been personally served with process of *subpœna* within this State, nor voluntarily submitted to the jurisdiction of the court, it is erroneous to render a final decree without the bond required by the act of 1805.—Clay's Dig. 353.

The decree must be reversed, and the cause remanded.

MILAM, Adm'r, *vs.* RAGLAND.

1. The appellate court will not reverse a decree of the Probate Court, on account of the misdirections of the judge to the jury, upon the trial of an issue of fact, in cases where the awarding of such issue is a matter of discretion in the court, when the verdict is in conformity with the evidence, and the final decree, based upon the verdict, is the same that it should have been without it.
2. When the testator is bound to protect his executor, or administrator, from all liability on a note, the executor, or administrator will be allowed to retain, out of the assets which come into his hands, the amount which he has paid on the note.
3. When a testator a short time before his death, in the presence of his executor, or administrator, hands money to a third person to be taken care of, and at his death there is no money on hand, it is the duty of the executor or administrator to show what has become of

it, and in the absence of any explanation on his part, he will be charged with the amount, on final settlement.

ERROR to the Probate Court of Talladega.

RAGLAND, as administrator in chief, *cum testamento annexo*, of James W. Milam, deceased, was cited by Jarvis J. Milam, the succeeding administrator, to appear and settle his administration on said estate. On the settlement, Ragland claimed a credit of $849 55, and interest thereon, for money paid by him to the Huntsville Bank, on a note signed by said James W. Milam, one William King, and said Ragland, (in the order of their names.) A jury was empannelled to try the issue made up between the parties, whether Ragland should be allowed to retain the whole amount thus paid by him, or a moiety only, and a bill of exceptions, which was taken on the trial, sets out the evidence which was before the jury. From this it appears, that the note was drawn for King's benefit; that Ragland had refused to become King's security, and had signed the note after it had been drawn and signed by Milam and King; and Milam's declarations were also proved, that he considered the debt his own, if not paid by King, and that he would not hold Ragland liable for any part of it, because there were matters between himself and King that Ragland knew nothing about. The Court charged the jury, that "if they believed from the evidence, that Milam said he would not hold Ragland liable on the note, because there were matters between him and King that Ragland knew nothing about, and that declaration was true, then, they would be authorized to find for Ragland," to which charge plaintiff excepted. The jury allowed Ragland a credit for the whole amount, and the court decreed accordingly.

It was also proved to the court on the settlement, that a day or two before Milam's death, Ragland handed him $100, which he immediately gave to Mr. or Mrs. Wilson, who lived with him, to put away. Ragland did not return any money on hand at testator's death, nor did he account for it on settlement. The court refused to charge him with it, to which also the plaintiff excepted.

The instructions given to the jury, and the refusal to charge Ragland with said sum of $100, are now assigned as error.

S. F. Rice, for plaintiff in error.

J. T. Morgan, and White & Parsons, *contra.*

DARGAN, C. J.—It is the duty of the Court of Probate to summon a jury in cases of contested wills, also in cases of insolvent estates, if required. But in all other cases the court should determine the facts without a jury, unless it should become necessary in the progress of a cause to ascertain some particular fact, and the testimony in relation thereto is so conflicting that doubts are created in the mind of the court how it should be decided. In such a case the court may, in the exercise of its discretion, empannel a jury to ascertain the truth of the fact.—Savage v. Dickerson, 16 Ala. 257. The awarding of an issue in such a case, like an issue from the court of chancery, is a matter of discretion, and the verdict is to satisfy the court of the truth of the facts submitted to the determination of the jury, and should the court not be satisfied with the verdict, it may be disregarded, and a final decree rendered according to the rights of the parties, as manifested by the whole evidence in the cause.—Danl. Ch. Prac. 1292, note; 8 Ves. 536; 2 Paige, 488.

In all cases where the awarding of the issue is matter of discretion with the court, and not matter of legal right in either of the parties litigant, should the final decree be in accordance with the justice of the case as shown by the proof, we would not reverse it because of the instructions of the court to the jury; for the decree being as it should have been, it must be affirmed without regard to the verdict. This, however, is to be understood to apply to those cases only where it is a matter of discretion with the court, whether an issue of fact shall be awarded or not, and further to those cases where the evidence justifies the decree; for we will not say that we would refuse to reverse a decree when the Probate Court misdirected the jury and their verdict was not supported by the evidence. All we intend to decide is this, that we will not reverse a decree for the misdirections of the judge to the jury upon a trial of an issue of fact, when their verdict is in conformity with the evidence, and the final decree based upon the verdict is the same that it should have been *without it.* We think the evidence in this case was abundant to show that the testator was bound to protect Ragland (*the executor*) from all liability upon the note of King, and consequently

there was no error in allowing him to retain out of the assets that came to his hands the amount of this note, which he had paid. This conclusion we attain from the evidence contained in the record, and as the verdict accords with the evidence, it is unnecessary to examine into the propriety of the instructions given by the court to the jury upon the trial of the issue.

It was proved that a day or two before the testator's death, Ragland handed to him one hundred dollars, and the testator gave it to Mr. or Mrs. Wilson, who lived with him, to put away. The executor has never accounted for this sum, nor has he returned any money on hand at the death of the testator. What became of it? We think the executor should answer this question, for he knew that the money was handed to Wilson a short time before the testator's death, and if no money was found at his death, it is but reasonable to presume that Wilson retained it in his possession for the testator, and no one having called upon him for it, the money is lost to the estate. If this presumption be true, and the evidence certainly warrants it, the loss is the result of the executor's neglect, and he must bear it. If a testator a short time before his death hands money to a third person to be taken care of, and at his death there is no money on hand, it is certainly the duty of the executor to call on such person and ascertain what has become of it, for *prima facie*, he still retains the possession of it, and the executor alone has the right to inquire into the matter and demand the money, if it has not been returned to the testator in his life-time; but the executor in the case before us, although he knew the money was handed to Mr. or Mrs. Wilson, has made no inquiry respecting it, nor has he returned any money on hand at the death of the testator. The presumption therefore is, that it is lost to the estate without any effort on the part of the executor to recover it, and without any explanation or reason why he did not recover it, or *attempt at least* to do it. Under such circumstances, we are constrained to hold, that the loss is the result of the executor's neglect, and he must be charged with it. The Court of Probate erred in refusing to charge the executor with this sum and interest thereon, under the proof contained in this record. For this error the decree must be reversed and the cause remanded.

McGREW & BECK *vs.* THE GOVERNOR, USE, &c.

1. The sureties of a justice of the peace on his official bond are only bound for the faithful performance of his ministerial duties, and not for errors, mistakes and omissions of a judicial character.
2. A constable, who has collected money on an execution, is an incompetent witness, without a release, to prove that he has paid it over to the justice of the peace who issued the execution.

ERROR to the Circuit Court of Sumter. Tried before the Hon. S. Chapman.

This was an action of debt brought in the name of the Governor, for the use of Carver and Woolsey, against the securities of a justice of the peace, on his official bond, to recover the amount of a promissory note placed in his hands for collection, by said Carver and Woolsey. Two breaches were assigned in the declaration; first, that he had collected the money due on the note, and had failed to pay it over, as by law required; and second, that he had failed to collect it, when by due diligence he might have collected it. The defendants demurred to each breach assigned, but their demurrers were overruled. On the trial, the plaintiffs introduced one Short, as a witness, who testified that the execution issued on the claim by the justice came to his hands as constable, that he collected the money on it, and paid it over to the justice, but took no receipt from him. Defendants objected to him as a witness, on the ground of his being interested in the result of the suit; but the court overruled their objection, and allowed him to testify, to which the defendants excepted. The defendants bring the case to this court by writ of error, and assign as error—1st, the overruling of their demurrers; and 2d, permitting Short to testify.

HALE & VARY, for plaintiffs in error, referred to the following authorities:—Clay's Dig. 358, § 1; 361, § 16, 17; 364, § 7; § 18, § 21; 365, § 13.—Chit. on Plead. vol. 1, 244, 374, 10 Am. Ed.; 2 Bay. 385; 2d N. & McC. 168; 4 Bibb, 28; ib. 237; 2 Blackf. jr. 72; U. S. Dig. Sup. 1, 324, § 428; Wright 733; 4 Blackf. 16, 129, 291; Harbin v. Knox, 7 Ala. 675; 2 Spear 48; 8 Miss. 115; Gov. v. Hancock and Harris, 2 Ala.

728; Johnson v. Gov. use, &c. 13 Ala. 526; Williams, judge, v. Hinckle, 15 Ala. 713; Nelson v. Bostwick, 5 Hill 39; 14 Eng. Com. Law, 93; 6 T. R. 200; 5 B. & C. 269.

REAVIS, *contra:*

1. The declaration is sufficient; first, because the recitals in the bond described, that Glover was a justice of the peace, and that the defendants are his sureties, are evidence of those facts. McWhorter v. McGehee, 1 Stw. 546. Secondly, because it was not necessary to allege, that the bond had been approved by the judge of the County Court; if it had not been, the fact should have been pleaded. Thirdly, because it is part of the official duties of a justice of the peace, to collect and pay over moneys, on claims placed in his hands.—Clay's Dig. 365, § 13; ib. 362, § 18. Fourthly, because it was not necessary to allege a demand, specially.—Hill v. Fitzpatrick, 6 Ala. 314. And fifthly, because the second breach was made good by reference to the first.—Mardis v. Shackleford, 6 Ala. 433; Morrison v. Spears, 8 Ala. 93.

2. The constable was a competent witness, because his liabilities were the same, whether the plaintiff recovered, or not; and the record would not be evidence for, or against him.—Stewart v. Conner, 9 Ala. 804-821; 1 Greenl. Ev. p. 434, § 389.

CHILTON, J.—A justice of the peace is a judicial officer as to civil matters falling within his jurisdiction as prescribed by the several statutes, (Clay's Dig. 358, 361, et seq;) and we think that the statute requiring him to give bond for the faithful performance of the duties of his office, and for paying over all moneys which shall come to his hands, to the person or persons entitled to the same, has reference to his ministerial and not to his judicial duties. We do not think the statute was designed to give an action against the justice for an act done judicially, and within the scope of his jurisdiction. It is unnecessary now to decide whether his securities could be charged, if in such cases he acts corruptly, or from impure motives.—Gregory v. Brown, 4 Bibb, 28.—See also, Lester v. The Governor, 12 Ala. 626, and cases there cited. If the justice in the case before us collected the money by virtue of his office, as he well may do under the statute, requiring the constable to pay the same over

to him when it has been collected under process, (Clay's Dig. 364, § 7,) an action would lie on his official bond for failing to pay it over; but we are of opinion, the justice cannot be charged, *as justice*, upon his undertaking as a collecting agent, for his negligence in failing to use proper means for the collection of the note placed in his hands. Being the judge to sit upon the case, to give judgment as the law and justice of the case require, he is the agent of the State for the due administration of the law, so far as his prescribed duties and jurisdiction are concerned, and not the agent of either party to conduct the prosecution or the defence of a claim to be prosecuted or defended before himself. Such agency might be inconsistent with the duties which he has to perform. We do not say there is any impropriety in placing claims in the hands of justices of the peace, that they may issue their warrants upon the same, and consider the effects of such evidence of indebtedness upon the trial without any more formal presentation of such evidence, but we can readily perceive how an agency as a collector generally might be incompatible with his duties as an officer; upon the whole, we think the safer doctrine to be, to hold his sureties only bound for the faithful performance of the ministerial duties devolved upon the justice of the peace, and not for errors, mistakes and omissions which are of a judicial character. The declaration in the case before us, and the assignment of breaches, do not set forth the character of the default for which the sureties of the justice are sought to be charged, with such certainty, as to enable the court to pronounce that the respective defaults complained of are covered by the bond declared on. In each breach, the plaintiff seems to proceed upon the idea that the justice is a collecting officer, and that his securities are liable for him as such, whether he collected the money by suit had before him in virtue of his office, as contemplated by the statute, or as agent without any proceedings; or that having negligently failed to collect it when by due diligence it might have been made, he is guilty of a breach of his duty as such justice, and liable to this suit, whether any proceedings were instituted before him or not. The second breach evidently deduces the liability of the sureties from the breach of duty on the part of the justice resulting from his contract to collect the note placed in his hands, and not for his failure to discharge any official ministerial duty devolved upon him by law.

We therefore conclude that the declaration was bad, and the demurrers should have been sustained.

We are of opinion that the constable, who, it is alleged, paid the money to Glover, the justice, is not a competent witness to prove that fact; for if the plaintiffs succeed in recovering from the justice, or from the sureties on his bond, they cannot again recover from the constable; so that conceding the latter collected this money, as he states, on execution, he is liable to the plaintiff, unless he paid it over either to the plaintiff or the justice, and to hold that he can prove he paid it to the justice, is to enable him by his own testimony to exonerate himself from liability by transferring or fixing it upon another. We are aware there is some conflict in the decisions upon this point; but this witness was interested most clearly in the plaintiffs' recovery, and all the reasons which may be urged for the exclusion of a witness, on account of interest, and which rest upon principle and sound policy, apply to him, and we therefore think he was improperly allowed to testify for the plaintiffs without a release.— 1 Greenl. Ev. §§ 393-396, and cases cited in notes; also, Moore and Jones v. Henderson, 18 Ala. 232, and cases there cited.

Let the judgment be reversed, and the cause be remanded.

NICOLAS *vs.* TRICKEY, USE, &c.

1. A witness for the State, in a prosecution against a party, cannot bring suit on his certificate of attendance, against the defendant, after his conviction.

ERROR to the Circuit Court of Covington. Tried before the Hon. Robert Dougherty.

THIS was an action commenced before a justice of the peace, by the defendant in error, on his certificate of attendance as a witness on behalf of the State, in a prosecution against Nicolas.

The suit was instituted after the conviction of Nicolas. Judgment was rendered in favor of the plaintiff by the justice.

The case was taken to the Circuit Court by the defendant, where judgment was again rendered in favor of the plaintiff. The defendant now brings the case into this court, and assigns as error the rendition of the judgment against him in the court below.

WATTS, JUDGE & JACKSON, for plaintiff in error:

1st. The bill of exceptions shows that the witness was summoned in behalf and testified in favor of the State in the prosecution. The defendant was convicted, and a judgment was rendered against him for the fine and costs of suit. All the right of action was thus merged in this judgment; and if he has not received his fees as witness, he must move the court to retax the costs.

2nd. The statute authorizing a witness to sue on his certificate of attendance applies solely to witnesses summoned in behalf of the person sued, (see Clay's Dig. 602, § 16;) and this only at the end of each term before the final disposition of the cause. After the final disposition of the cause, it is submitted, that the witness could only recover for his attendance through the judgment rendered, and would not have the right to multiply costs by bringing separate suits.

The bill of exceptions shows that the witness was not sworn by the clerk, and therefore, his certificate was not evidence to establish the attendance, and the amount to be received.—See Clay's Dig. § 6, p. 600; § 12, p. 601. The State witnesses have no other means provided, by which they can recover their costs out of the defendant in a State cause, than through the bill of costs.—See Clay's Dig. 600, § 7; and the witness had ample remedy by motion to retax.—See Marsh v. Bank, 10 Ala. 57; Carrill, use, &c. v. Reynolds, 9 Ala. 969.—See Briley v. Hodges, 3 Por. 335.

MARTIN & BALDWIN, *contra:*

The clerk upon the oath of the witness shall grant him a certificate of his attendance, stating the amount the witness may be entitled to for his attendance.—Clay's Dig. 601, § 12.—Witnesses' fees for attendance in behalf of the State to be paid by the defendant on conviction.—Clay's Dig. 600, § 6.

It is not the duty of the witness to leave his certificate with

the clerk of the court, to be taxed in the bill of costs, nor is he bound to await the return of an execution against the defendant, but may sue upon his certificate immediately.—Hill & Proctor v. White, 1 Ala. 577-8.

PARSONS, J.—It is only necessary to decide the question, whether a witness for the State, in a prosecution against a party, can bring suit on his certificate of attendance, against the defendant, after his conviction. In civil cases a witness may bring such a suit against the party in whose behalf he was a witness, even after the trial and judgment.—Hill & Proctor v. White, 1 Ala. 577.

In State cases, it is obvious that a witness for the State cannot bring suit for his attendance against the defendant before his conviction; after the conviction, the defendant becomes liable to the witness for his attendance. The act is, that "all witnesses, appearing in behalf of the State, in any criminal prosecution, shall be allowed the same compensation for their daily attendance, as is allowed to witnesses attending upon civil prosecutions; and such fees for attendance, together with all costs of the prosecution, shall be paid by the defendant upon conviction, &c."—Clay's Dig. 600, § 7.

In our practice the judgment goes in the name of the State against the defendant for the costs, though they are not ascertained by the judgment itself, but are to be taxed by the clerk, and may be collected by execution. In this manner the costs due to the witnesses are taxed, and when collected, are paid to the witnesses. The statute already cited contains a further provision in cases where the defendant is convicted, that in case the defendant shall not be able to pay costs, the clerk of the court shall grant a certificate of attendance for the witnesses of the State, in the manner that tickets are granted to the jurors, which are to be received by the sheriffs in payment of public dues, &c. By another act, the lands, goods, &c. of the person convicted, are to be liable to the discharge of the expenses incurred by the State or county, in the prosecution, in preference to all other demands, except dower and jointure.—Clay's Dig. 482, § 36. There is no statute which, in criminal cases, gives a witness for the State a right of action against the defendant. The omission, I think, was intended. His claim

against the defendant does not accrue until the moment of, and is merged in the judgment, and it is the judgment that gives the right. This view will prevent a multiplicity of unnecessary suits by the different witnesses against the defendant; and their rights and the rights of the public are most advanced by giving to the judgment this effect. Thus it can be ascertained by the return of a single execution, whether the witnesses are to be paid out of the public dues, and in the event of such a payment, the entire amount for which a preference is secured to the State by the act is to be ascertained by the taxation of the costs, instead of having to go to the different judgments recovered by the witnesses before justices of the peace, in which there must necessarily be new bills of cost.

There are distinctions, which will appear form what has been said, between this case and that of Hill & Proctor v. White. The judgment is reversed.

NELSON *vs.* IVERSON.

1. The declaration of a party while in possession of a slave, "that she was his negro, and that he intended to keep her," is admissible in evidence, as part of the *res gestæ*, to prove the character of his possession.
2. The statement of a witness, that a person *was in the habit of exercising control* over a slave, is admissible. If the expression is objectionable, as being too general and indefinite, the opposite party should require an explanation of it from the witness.
3. The declarations of the mother of an infant, while she has the possession of a slave, which she holds as guardian or bailee for her infant son, cannot be received in evidence to defeat his rights. Yet if she claims the slave as his property, asserting his title in an open, notorious manner, as adverse to the claim of every one else, it would be admissible to prove, by her acts and declarations contemporaneous with her possession and tending to show its character, that she held the slave as the property of another, and not for her son.
4. When a witness speaks in her deposition of a conversation in which

the donor had expressed an intention to give a slave to the donee, and also says, that the slave was given to the donee by the donor, at a certain time, and delivered to her, (the witness,) for him, it is erroneous to charge the jury that the latter statement cannot be regarded by them as showing a gift, but as at most only showing an intention to give, and as the conclusion of the witness. The whole testimony should be left to jury, to determine whether a gift was not made, *in fact*, as consummated by the delivery.

Error to the Circuit Court of Macon. Tried before the Hon. E. Pickens.

This was an action of detinue, brought by Nelson against Iverson, to recover two slaves, which the plaintiff claimed under a parol gift from his maternal uncle, Garland Dawkins. The plaintiff proved by his mother, Mrs. Nelson, that the mother of the negroes in suit was given to him, in 1823, by said Dawkins, and delivered to his mother, for him, he being then an infant; that she kept said negro until 1830, when Dawkins obtained the possession from her, to prevent said negro from being levied on, as the property of her husband, Wm. Nelson; that Dawkins promised to return her to witness in a few days, but never did return her; Mrs. Nelson also spoke of a conversation which she had with Dawkins, a few months before plaintiff's birth, in which Dawkins promised, that if she had a son, he would give him the said negro. The defendant offered to prove, that after Dawkins obtained possession of said slave, "he said that she was his negro, and he intended to keep her." The plaintiff objected to this evidence, but the court overruled his objection, and plaintiff excepted. The defendant offered to prove by the widow of said Dawkins, that her late husband, in the latter part of the year 1823, while said negro was in the possession of Mrs. Nelson, "was in the habit of exercising control over her." Plaintiff objected to this evidence, but his objection was overruled, to which he excepted. The defendant offered to prove, by Mrs. Lawless, that she had heard Mrs. Nelson, while in possession of said negro, say, "that the girl belonged to her brother, Garland Dawkins, and that she expected he would take her away before long." Plaintiff also objected to the admissibility of this evidence, but the court overruled his objection, and admitted the evidence, to which also plaintiff excepted. The court charged the jury, that the ex-

pression in Mrs. Nelson's deposition, "that the girl was given to plaintiff by Garland Dawkins, in 1823," could not be regarded by them as showing a gift of said negro, but could at most be regarded as showing an intention to give, and as the conclusion of the witness, to which charge the plaintiff excepted.

RICE & MORGAN, for plaintiff in error:

1. The several declarations of Garland Dawkins, the donor, made long after the gift, were improperly admitted as evidence against the donee; especially the declaration that "he (the donor) intended to keep her."—Nelson v. Iverson, 17 Ala. 216.

2. Mrs. Martha Nelson had no interest in the slave, but held her merely for the purpose of protecting the right of the donee, and could do no act destructive of it. *A fortiori*, her declarations are not admissible to defeat the right of the donee.—Easley v. Dye, 14 Ala. 168, (eighth paragraph of the opinion.)

3. It was erroneous to allow the widow of the donor to testify that about the time of their marriage, the donor "was in the habit of controlling Judy." The habit of a donor cannot be thus proved, nor is it legal evidence.

4. The declaration of Mrs. Nelson, as shown in the seventh exception, was admissible at the stage of the evidence when it was offered. Its admissibility is defensible upon the ground that it was the declaration (against her interest and in disparagement of her right,) of one who, although not at the moment in the actual possession of the slave, was in the constructive possession, because she had had the possession for many years, and had delivered it to the donor as a mere bailee to keep for a few days, on his promise to return. The possession of the bailee is the possession of the bailor. And it was also admissible to countervail the force of declarations of her's improperly admitted at the instance of defendant, tending to show that the donor had not given Judy to the plaintiff.

6. The charges of the court are palpably erroneous—(Thomas v. De Graffenreid, 17 Ala. 610—same case, 13 ib. 610)—showing the error of referring to the jury the question of the admissibility of certain evidence.

BELSER & HARRIS, *contra:*

1. The two first exceptions are covered by the following cases:

Nelson v. Iverson, 17 Ala. 216; Thomas v. De Graffenreid, ib. 602; Oden v. Stubblefield, 4 ib. 40; Gary v. Terrell, 9 ib. 206; Parker v. Goldsmith, 16 ib. 526.

2. The evidence as to the habit of Dawkins in controlling the slave, if wrong, should have been explained at the request of the plaintiff below.—McGrew & Harris v. Walker, 17 Ala. 827.

3. The testimony intended to contradict Mrs. Nelson was properly admitted.—Nelson v. Iverson, 17 Ala. 216; 1 Greenl. Ev. 462; Moore v. Jones, 13 Ala. 296.

4. The third interrogatory and answer to it of Mrs. Lawless was also properly admitted.—Nelson v. Iverson, 17 Ala. 216; Thomas v. De Graffenreid, ib. 602.

5. The testimony of the counter declarations of Mrs. Martha Nelson, offered by the plaintiff, were properly excluded by the court. She was not in possession of the slave at the time, and besides, they were inadmissible to prove title in the slave.—Lee v. Hamilton, 3 Ala. 529.

6. The charge of the court is correct as an instruction to the jury. But if incorrect, the error is in favor of the plaintiff. The plaintiff, if dissatisfied with it, should have had it explained.—State v. Brazier, 5 Ala. 241; Ib. 477.

CHILTON, J.—When this case was in this court at a previous term, (17 Ala. 222,) most of the points now presented by the bill of exceptions were decided. That decision will show that the Circuit Court did not err in admitting the declaration of Garland Dawkins, made while he was in possession of the mother of the slaves sued for.

We are unable to perceive any error in admitting the testimony of Mrs. Dawkins to prove that her late husband was *in the habit* of exercising control over the slave. We understand the witness to mean by the term "habit," that her husband exercised repeated acts of control—that he usually or customarily controlled the slave. If the term, being general, required explanation so that the jury might attain to a more definite idea of the witness' meaning, the plaintiff could have called for such explanation as he deemed necessary, by cross examination. The proof made by Mrs. Edge, instituting a comparison between her child and that of Mrs. Nelson, was, we think, irrelevant, and

should have been rejected; but we cannot percieve how such proof could have injuriously affected the plaintiff.

As to the declarations of Mrs. Nelson, while she had the slave in her possession, if it were conceded that she held as the guardian or bailee for her infant son, then it is clear that no declaration of her's could be received in evidence to defeat his rights; but we gather from the record that the character of her possession, which she testifies continued for more than seven years, was an important inquiry; for, aside from the fact whether there was a gift, yet if she held the possession of the slave, claiming her as the property of her infant son, asserting his title in an open, notorious manner, as hostile to the claim of every one else, the statute of limitations would perhaps have an important bearing and render it necessary for Dawkins, or those claiming under him, to show that by her acts and declarations contemporaneous with her possession and tending to show its character, she was holding the slave as the property of Dawkins, and not for her son.

We are, however, of opinion that the court misconceived the law in the instruction to the jury, as to the force and effect of Mrs. Nelson's testimony in respect to the gift. She not only speaks of a conversation had in June, 1823, as tending to show an intention to give, but of an actual delivery of the slave, which, if made in pursuance of such intention, would have consummated the gift. The court could not then properly assume, that when the witness said the slave was given in 1823, that this was a conclusion deduced from the conversation merely, but should have left the whole testimony to the jury, that they might weigh it and determine for themselves whether the gift was not made in fact, as consummated by the delivery.

Let the judgment be reversed and the cause remanded.

BLOUNT *vs.* HAWKINS.

1. A promise made by the surety on a replevy bond, executed for the forthcoming of property levied on under attachment, to the plaintiff in attachment, that if he will dismiss the suit, he, the surety, will pay the debt, is an original undertaking, and is not within the statute of frauds.

ERROR to the Circuit Court of Barbour. Tried before the Hon. Geo. Goldthwaite.

SAYRE, for plaintiff in error.

BUFORD, *contra:*

DARGAN, C. J.—The plaintiff below sued out an attachment against Lunsford, for a debt of ninety-two dollars, which was levied on a mare as the property of the debtor. The defendant in that suit executed a replevy bond, in which the defendant in this suit, Blount, joined as security; after this Blount agreed with the plaintiff, that if he would dismiss the attachment suit, he, Blount, would pay the debt. The suit was dismissed, and this action is brought against Blount on this promise, and the only question is, whether it comes within the influence of the statute of frauds.

I think I can safely say, that all the authorities agree in this, that if the promise be supported by a new consideration, beneficial to the promisor and moving from the promisee, then it is considered an original undertaking on the part of the promisor, and is not within the statute of frauds.—McKenzie v. Jackson, 4 Ala. 230; Brown v. Barnes, 6 Ala. 604; Leonard v. Vrendenbergh, 8 Johns. 23; 10 Johns. 412; Nelson v. Boynton, 3 Metc. 396, and the cases there cited.

There is however, a conflict between the decisions, whether a promise made, to pay an existing debt of another, founded only on a prejudice or injury to the promisee, and without benefit to the promisor, can be enforced as an original promise. But we do not think it necessary in this case to examine these decisions, or to decide, whether injury alone to the promisee will be such a consideration as to support the promise; for we think that the

consideration upon which the promise was made in the case before us was not only injurious to the promisee, but also beneficial to the promisor. It was injurious to the plaintiff in this, that on account of this promise, he dismissed his suit commenced by attachment, which had been levied upon, and created a lien on property belonging to the original debtor, Lunsford. It was beneficial to the defendant, inasmuch as the dismissal of this suit discharged him from his liability as surety on the fortheoming bond, executed by Lunsford and himself, and we apprehend there can be no doubt that the promise must be enforced, when the consideration is not only an injury to the promisee, but also beneficial to the promisor.

Let the judgment be affirmed.

SMITH, USE, &c. *vs.* HOOKS, *et al.*

1. The recovery and satisfaction of a judgment in an action of Trover, for the conversion of a slave, who was drowned while in the possession of the defendant under a contract of hiring, damages being assessed for her value at the time of the converson, vests the title in the defendant from the time of the conversion, and hire cannot be recovered for the unexpired part of the term.

ERROR to the County Court of Sumter.

R. H. SMITH, for plaintiff in error.

It is settled by many authorities that in trover the plaintiff may recover the value of the property at the time of conversion, or at any time between that and the trial.—Tatum v. Manning, 9 Ala. 144.—The case, White v. Martin, 1 Por. 215, only holds that slaves born pending the suit cannot be recovered, but this does not conflict with the principle above. Indeed the court say, in White v. Martin, that plaintiff might have dismissed his suit, and brought another, including the issue.—The case Lee v. Mathews, 10 Ala. 682, is in principle to the same point.

The property in the goods is not changed by the default of

defendant, but by the recovery of the judgment, (Carlisle v. Burley, 3 Greenl. 250;) and it would have been more proper to have said, by the payment of the judgment.

The time of conversion, laid in the declaration, cannot be conclusive, because the time need not be proved as laid, and parol evidence is admissible to show for what the recovery actually was.—4 Phil. Ev. note 590, p. 837-9, ib. 829; Robertson v. Windham, 9 Por. 397. The death of the slave did not excuse defendant from paying hire for the whole year.—Perry v. Hewlett, 5 Por. 318. If so, to hold that in this case he is excused, would be to establish, that although defendant would not have been excused by natural death of the slave, yet he is, because he caused her death; for if plaintiff asserted his right to damages for the wrong, the principle insisted on would excuse the hire. It is certainly not wrong to allege the drowning at the time it actually took place. The plaintiff had a right to do as he did, to waive his right of action in trover, until the termination of the hiring, and to recover the hire, and to treat the conversion as accruing at its expiration.

HUNTINGTON, *contra:*

Recovery in trover, vests the title of the property in the defendant, and the damages recovered are the price of the chattel so transferred by operation of law; and when the judgment is satisfied, the vesting of the property in the defendant relates back to the time of the conversion.—White v. Martin, 1 Por. 215. It follows from this, that the defendant in error having converted the negro during the year for which he hired her, having paid her value under execution for said conversion, was only bound to pay hire from the beginning of the year up to the time when the conversion occurred; for then the title of the property was changed, and the negro became his by relation, from the time when the judgment against him was satisfied. The defendant's plea therefore was good.

DARGAN, C. J.—Without alluding to the form of the pleadings, I will content myself with stating the facts presented by them, and which give rise to the question of law that we must decide. The defendant, Hooks, hired of the plaintiff a female slave for the year 1847, and gave the note declared on

to secure the payment of the hire. On the 15th day of July, 1847, during the term of hire, the slave was drowned, under circumstances that rendered the defendant liable for her value. In February 1848, the plaintiff brought an action of trover against Hooks, laying the conversion on the day she was drowned, and recovered damages, which were assessed at the value of the slave on the day of the conversion. But at the request of the plaintiff's counsel, interest upon the damages was not allowed until the first day of January, 1848, at which time the term of hiring expired. Upon these facts, the question is, whether the plaintiff can recover hire from the 15th of July, 1847, the day on which the conversion took place.

It is very clear, that one who hires a slave, or any other chattel, cannot dissolve the contract of hiring, or relieve himself from the payment of the hire, by a conversion of the chattel during the term. But if he violates the obligations of his contract of hiring, and destroys the chattel, we think it equally clear that the owner is not bound to wait until the time of hiring is expired, but may abandon the contract, and sue in trover. He is not, however, compelled to do so; he may wait until the term of hiring is expired, and sue for the hire, as well as for a failure to return the chattel hired. But if he brings trover either before or after the term of hiring is expired, and recovers the value of the chattel at the date of the conversion, and the recovery is satisfied, the title of the chattel must then be considered as vested in the defendant from the time of the conversion; for the rule is well settled, that a recovery and satisfaction in the action of trover vest the title of the chattel in the defendant from the time of the conversion.—White v. Martin, 1 Por. 215; Hepburn v. Sewell, 5 Har. & J. 211.

It will follow, I think, that the contract of hiring must be considered as dissolved, from the time the title vests absolutely in the party who first hired, and then converted the chattel, and from that time the plaintiff cannot recover hire. But it may be urged, that this view would preclude the plaintiff from recovering in assumpsit for the hire of the slave, after a recovery in trover, although the damages were assessed, not according to the value of the slave at the time of the conversion, but at the time the slave should have been returned to the owner. This question I will not decide, because it is not absolutely necessary.

But I hold that if the value of the slave is estimated according to its value at the date of the conversion, the satisfaction of the recovery vests the title in the defendant from the time of the conversion, and from that time no hire can be recovered; and if the plaintiff could be permitted to recover hire after the conversion, he must show that the value of the slave was not estimated at the time of the conversion, but at the time the slave should have been returned to him. That the plaintiff waived interest on the value of the slave from the date of the conversion until the end of the term of the hiring, cannot aid him, for the value of the slave at the time of the conversion he has received; this deprives him of title from that time, and if he could be permitted at all to recover hire after a recovery in trover, he must show that the damages assessed were estimated according to the value of the slave, when it should have been returned to him, and not according to the value when converted.

The ruling of the court does not contravene the law, and the judgment must be affirmed.

AMASON *vs.* NASH, *et al.*

1. It is erroneous to render judgment by default, before a declaration has been filed.

Error to the Circuit Court of Sumter.

Reavis, for plaintiff in error:

1. The judgment was rendered by default, before a declaration was filed, as appears by the certificate of the clerk, which states that the declaration was filed after the adjournment of the court which rendered the judgment. This certificate is part of the record.—McElroy v. Dwight, 1 Stew. 149.

2. It is error to render judgment by default, before a declaration is filed.—Rankin v. Crowill, Minor, 125; McElroy v. Dwight, 1 Stew. 149; Oliver v. Judge, 2 Stew. 483; Master-

son v. Beasley, 1 Stew. & Por. 247; Evans v. Bridges, 4 Por. 350; Wheeler v. Ballard, 6 Por. 358; Benson v. Campbell, 6 Por. 455; Napper v. Noland, 9 Por. 218; Price v. Chevers, 9 Por. 511; Ware v. Todd, 1 Ala. 199; Wellborn v. Sheppard, 5 Ala. 674; Tunstall v. Donald, 15 Ala. 841. And the error cannot cannot be cured by filing a declaration afterwards.—Rankin v. Crowill, Minor, 125.

DARGAN, C. J.—The authorities cited on the brief of the plaintiff's counsel conclusively show that a judgment by default without a declaration is erroneous. We have in our practice, it is true, greatly relaxed the stringent rules of the common law; but we never have sustained a judgment by default, when there was no declaration. The record before us shows that at the time the judgment was rendered, no declaration had been filed, nor was it filed until after the adjournment of the court. The rendition of judgment without a declaration was an error which the plaintiff could not cure by filing a declaration after the court adjourned.—See McElroy v. Dwight, 1 Stewart, 149; Rankin v. Crowill, Minor's R. 125.

Let the judgment be reversed, and the cause remanded.

PRINCE, Adm'r, *vs.* BATES.

1. In a proceeding under the statute before the Orphans' Court, to compel the administrator of a deceased vendor to make title to land, which had been sold by the deceased, and for which he had executed his title-bond, the administrator is the only *indispensable* party defendant to the petition, and he may sue out a writ of error alone to reverse a decree rendered against him.
2. The fact that the deceased vendor assumed to sell the land and executed his bond for title raises the presumption of ownership in him, and the *onus* of showing an outstanding title is cast on the adverse party.
3. If the person holding the bond for title has sold a part of the land to a third person, the Orphans' Court is not thereby deprived of jurisdiction.

4. If the obligee of the bond transfers to his vendor the notes of a third person, to whom he has sold a part of land, and takes up his own notes, the vendor has a lien on that part of the land thus sold, for the payment of the notes transferred, which is not lost by his failure to fix the liability of the endorser by suit against the maker, and it is erroneous to decree that the administrator shall make title to the land until the notes thus transferred have been fully paid.

ERROR to the Probate Court of Marengo.

BROOKS & MANNING, for plaintiff:

1. The purchaser of land holding a bond for title must have paid all the purchase money before he is entitled to a decree directing the administrator to convey. If any portion of the purchase money remain unpaid the court will refuse the prayer for a conveyance.—Driver, adm'r, v. Hudspeth, 16 Ala. 350. In this case the only evidence of the payment of the purchase money offered by Bates, was the production of his original notes. But the administrator proved that Bates took up his original notes by giving to Fareinholt, the vendor, a note on one Posey, payable to Bates and by Bates endorsed to one Fareinholt, which said note remains unpaid. Ergo, the purchase money has not been all paid, and the vendee, Bates, is not entitled to his decree.

2. To entitle the vendee to a conveyance, he should have a perfect equity. In this case it appears that Bates, before filing his petition, had sold a part of the lands to Posey, (for which the above mentioned note was given;) therefore Posey's heirs, and not Bates, were and are entitled, upon the payment of the balance of the purchase money, to have that portion of the lands conveyed to them. But the court ordered the administrator to convey the entire tract to Bates.

3. The court of equity, and therefore the Orphans' Court, will not compel a vendor who has no title to convey. In this case objection that the vendor had no title was made in the court below, and no proof whatever of title in Fareinholt was made, excepting his parol admissions; which evidence is entirely insufficient.

HUNTINGTON, *contra:*

1. There was no proof that Fareinholt used statutory diligence to recover the notes of Posey, substituted for those of Bates and

endorsed by Bates when his own notes were given up. In England the effect of taking a note under such circumstances, is, that the creditor cannot proceed for the original debt, without showing the use of due diligence to obtain payment of the substituted note, and notice to the party of its dishonor.—Bates v. Ryland, 6 Ala. 473, citing Story on Bills, 127, § 112. In New York it is held, that the original debt is gone by the acceptance on account of it of a note on a third person endorsed by the debtor, so that no remedy whatever can be had, except upon the endorsement.—Frisbie v. Larned, 21 Wend. 452. Such is clearly the law under our statute; for, if the creditor by his own laches loses the right to sue upon the endorsement, it would defeat the statute to allow him to sue upon the original consideration.

2. As to the point, that there was no sufficient proof that Fareinholt was the owner of the land, the decree recites that he was. In addition, the bond for titles and the written admission made out a *prima facie* case which was not repelled by any countervailing proof whatever on the part of the plaintiff in error. The presumption of law is, that the title is in the vendor who gives a bond for title, and he can only resist a specific performance by showing affirmatively that the title is in somebody else. We were not bound to prove negatively that Fareinholt had not acted fraudulently in selling us the land.

3. As to the heirs of Posey, they could not be made parties to this statutory proceeding, because they did not hold Fareinholt's bond for title. The statute is only for the benefit of those who hold a decedent's bond for titles. The practical operation is the same, for whenever Bates should get a deed from the administrator of his vendor, he would be a trustee for his own vendees, as to the portion sold them.

4. As to the objection that no guardian *ad litem* was appointed for Mrs. Dew, (she and her husband being non-residents and made parties by publication,) a married woman has no separate existence in law, and if a guardian *ad litem* be necessary for her, where is the use of making her husband a party? The husband becomes the owner of his wife's property in the hands of her guardian immediately upon marriage, and if she die while the guardian has it, the husband can sue for and recover it.—Pitts v. Curtis, 4 Ala. 350.

5. The writ of error ought to be dismissed for want of proper parties. The infants by their guardian *ad litem* and Mr. and Mrs. Dew ought to have joined in suing out the writ of error. That the objection is good at this time, see Jamieson v. Colburn, 1 S. & P. 253; Billingslea v. Abercrombie, 2 ib. 24.

CHILTON, J.—1. We do not think this writ of error should be dismissed for want of proper parties, as in our opinion the proper parties are before the court. In applications of this kind, the statute seems to regard the administrator or executor of the deceased vendor as the only indispensable party defendant, though others interested could perhaps come in, propound their interest and be allowed also to defend. Nothing of this kind, however, occurred in the court below, and the case is properly represented in this court by the administrator against whom the decree was rendered, as the plaintiff in error.—Clay's Dig. 157, § 38. The motion to dismiss the writ must be overruled; for if the objection taken were well founded, this court would allow the writ to be amended under the act of 1843.—Clay's Dig. 312, § 39.

2. The statute enacts, "That when any person owning lands or tenements, shall sell the same, and enter into bond or obligation to make titles thereto, and shall depart this life without having made titles, in that case the person to whom such bond or obligation was given, his executors or administrators, may petition the Orphans' Court of the county, where probate of the will of such deceased person was taken, or letters of administration granted, to compel the executors or administrators to make titles, agreeably to the bond or obligation given by the decedent," &c. It then prescribes notice to be given by publication in some newspaper in the State once a month for at least three months, when the court may, if it find the said contract was fairly made, order the executor or administrator to make titles as such, to the lands, &c. We have recently held, (16 Ala. 348,) that in proceeding under this statute, the petition should disclose that the deceased was the owner of the land at the time of his death. No objection is taken in this case to the petition, which indeed appears to be very correctly drawn; but it is insisted that the parol declarations of the decedent, that he was the owner of the land, as set out in the bill of exceptions, were insufficient to show that he was

the owner. Be this as it may, we think the presumption of ownership is created by his assuming to sell the land and executing his bond for title, and the *onus* of showing an outstanding title was thus cast on the adverse party.—Samuels v. Finley, 7 Ala. 635.

3. Neither, in our opinion, would the fact that the person holding the bond for title had sold a portion of the land to a third party, deprive the Orphans' Court of jurisdiction. It is indispensable that he should procure a title himself, before he can comply with his engagement to convey a title to his vendee, and if he has paid in full for the land, so as to relieve it from all liens which the decedent could assert against it for the purchase money, and holds the title-bond for the latter, the administrator has no concern with the disposition which he intends to make, or has contracted to make of the title, after it shall have vested in him.

4. We are informed by the bill of exceptions in this case, that Bates having purchased the land from Fareinholt, took his title-bond and executed his notes for the purchase money; that he afterwards sold a portion of the land to one Posey, and took Posey's notes, which he endorsed to Fareinholt, and took up his own notes, paying the balance in money; Posey died and his estate was declared insolvent, and paid on final settlement only seventy per cent. to the creditors. The balance upon the notes of Posey remains unpaid. It is insisted that, inasmuch as it does not appear that Fareinholt prosecuted the maker of the note endorsed by Bates so as to fix a liability on Bates as endorser, that he must be discharged from the notes and the arrangement regarded as a complete payment, so far as Bates is concerned. However true this would be, as respects the notes of a party disconnected from the purchase of this land, we think it very clear in the case before us, that as the notes of Posey were given to Bates in consideration of the purchase of a portion of this land, Bates held a lien on the land thus sold for the payment of the purchase money. It is, further, a well settled rule of law, that where a party endorses and transfers a note secured by a lien, which is in the nature of an equitable mortgage, he transfers with it the lien for its security. In other words, the debt, which is the principal, being assigned, the lien, which is the incident, follows it into the hands of the assignee, and this lien is

not lost, although the endorsee or assignee may have lost his recourse as against the assigner or endorser.—Roper v. McCook & Robison, 7 Ala. 318. It is very clear that a court of equity would decree a sale of that portion of the land sold by Bates to Posey in satisfaction of the balance of the note of Posey, in virtue of the lien; and this being so, that no court should compel Fareinholt to part with his title to that portion until the demand, which constitutes a lien upon it, shall have been satisfied.

In Driver v. Hudspeth, 16 Ala. 348, we held that the vendee who sought title by this summary remedy must show that he has an equitable right to the land, freed from the lien of the vendor, before the Orphans' Court can properly decree title to be made by the personal representative. In this case, it is true, the decedent may have lost his lien which he originally had as against Bates, by losing his recourse upon his endorsement; but then Bates having sold and transferred the note to his vendor, the latter is subrogated to the rights of Bates, and consequently still retains a lien on the portion of the land which Bates sold. Thus the case is brought within the influence of the decision of Driver v. Hudspeth.

It results from this view, that the Orphans' Court erred in decreeing that the administrator should convey before the remainder of the note on Posey was paid.

Let the decree be reversed, and the cause remanded.

PURDOM & McBROOM, Adm'rs. *vs.* McBROOM.

1. When the settlement of an insolvent estate is pending in the Chancery Court, and a final decree has been rendered in favor of the creditors against the administrators, and a balance is found in the hands of the administrators after satisfying all claims against the estate, a distributee of the estate may profound his interest to the court by petition, praying to be made a party to the cause, and for a decree against the administrators in his favor, for his distributive share of the balance in their hands to be distributed.

2. But it is erroneous to render a final decree, in such a case, in favor of a distributee, against the administrators, without giving them notice of the filing of the petition, and thus allowing them an opportunity to contest the petitioner's claim.

ERROR to the Chancery Court of Madison. Tried before the Hon. D. G. Ligon.

On the 5th of June, 1850, Stephen McBroom filed his petition in the Chancery Court of Madison, in which he alleged that a cause entitled "In Re, estate of Wm. McBroom, deceased," had been transferred to said court from the Orphans' Court of said county; that a final decree had been rendered in said cause, in favor of certain creditors of said estate, against the administrators; that by the master's report made in said cause, a large balance was found remaining in the hands of the administrators, after satisfying all claims against said estate; and that the petitioner was one of the heirs at law of the deceased. The petition prayed a reference to the master, to ascertain who were the heirs at law of the deceased, and the amount to which each one would be entitled of the fund remaining in the hands of the adminstrators to be distributed, and for a decree against said administrators for petitioner's distributive share.

On the same day the petition was referred to the master, who made his report on the next day, in favor of the petitioner, as one of the heirs at law of the deceased.

The report was forthwith confirmed, and a final decree rendered against the administrators, for the petitioner's distributive share of the surplus of said estate, in said administrators' hands to be distributed, as ascertained by the master's report.

The administrators were not notified of the filing of the petition, or of the subsequent proceedings, and they have now sued out a writ of error to reverse the decree rendered against them.

C. C. & J. W. CLAY, for plaintiffs in error:

In Cheny & Bell vs. Belcher, 5 Stew. & Por. 133, it is decided that, on a bill to compel distribution, although final settlement has been made by the Orphans' Court, the administrator is not precluded from showing (1) a mistake in the settlement,

(2) payments subsequent to settlement, or (3) any other matter which, in equity and good conscience, should be admitted as a defence.

In Blackwell's Ex'rs. v. Meneese, 5 Stew. & Por. 397, the court, after reciting the proceedings on the final settlement of the estate, remark," unless the *nunc pro tunc* judgment, which is here sought to be reversed, can be attached as a sequel to the above recited proceeding, there is nothing to sustain it whatever." In the case at bar, the decree was not *nunc pro tunc*, but a proceeding entirely separate, and apart from the final settlement. The necessity of citation, and its service, is shown by Welch's Adm'r. v. Walker & Wife, 4 Por. 121.

Previous to a final decree upon a bill filed to compel a distitution of an estate, all the distributees should be made parties, or reason shown why the same cannot be done.—Draughon v. French's Adm'r, 4 Por. 368.

On the final settlement of an estate, all the necessary parties must be before the court, otherwise there is " a total absence of jurisdiction in the court to render any decree whatever."—Boyett et al. v. Kerr, 7 Ala. 15.

No counsel for defendant.

DARGAN, C. J.—When a cause involving the administration of an estate is transferred from the Orphans' Court to the Court of Chancery, the chancellor receives it as a cause pending in his court, in the condition in which he finds it. In his subsequent proceedings, however, he is governed by the practice of his own court, but applies the same rules of law to the case, that would govern it if the cause had continued in the Orphans' Court.—Hall v. Wilson, 14 Ala. 295; Taliaferro v. Brown, 11 Ala. 702. The cause is pending in the Chancery Court from the time when it is received; but from that time forward, the practice which should govern it to a conclusion should conform, as near as can be, to those rules that would govern if the suit had been regularly commenced by bill.

But what has been done in the Orphans' Court, if in accordance with law and the practice of that court, is regularly done, and the decree cannot be reversed because the proceedings of the Orphans' Court do not conform to the practice of a Court of Chancery.

I have said this much to show the propriety of allowing the petitioner the relief which he seeks by petition, instead of compelling him to file a bill. For if the cause had been regularly commenced in the Court of Chancery, the petitioner would have been a proper, if not a necessary party, and being a proper party, we should presume he would have been made a defendant to the bill, and therefore might have obtained by petition any surplus to which he might have been entitled under the decree.

But I know of no case where one should be decreed to pay money to another upon a petition, without giving him notice of the petition, and allowing him an opportunity to contest it; and in the case before us, we think it clear, that no decree should have been rendered against the administrators, until they had been notified of the petition, and thus an opportunity had been given them to controvert the petitioner's claim; for in the administration of insolvent estates, (which this appears to be) the distributees are not necessary parties to the settlement in the Orphans' Court, and when the settlement of such an estate is transferred to the Court of Chancery, the cause proceeds between the creditors and the administrator, without even bringing to the notice of the court the names of the distributees. They are strangers to the record, and should not be allowed to interpose by petition and claim under the decree, without giving the party notice who is to respond to their claim. This view shows that the decree of the chancellor is erroneous.

The petition was filed on the 5th day of June, 1850; on the 6th an order of reference was made upon it, and at the same time a final decree was rendered in conformity with the prayer of the petition; but the administrators had no notice of this proceeding, nor any opportunity to controvert the petitioner's right, or to deny their liability to his demand. No principle will justify such proceedings, and the decree must be reversed, and the cause remanded.

ARRINGTON *vs.* BURTON.

1. If an agent, having parol authority to fill up a blank to which his principal has simply signed his name, converts the blank into a sealed instrument, his principal is not bound by it.

ERROR to the Circuit Court of Greene. Tried before the Hon. Jno. D. Phelan.

Covenant by the plaintiff in error against the defendant, in a bond for sixty dollars, purporting to have been given for the hire of a negro. The circumstances under which the bond was executed sufficiently appear in the opinion.

MURPHY for plaintiff in error.

J. B. CLARKE, *contra:*

1. No one can fill up a blank in a sealed instrument, so as to bind a person who has signed his name simply to the blank without special authority to do so.—Manning & Adams v. Norwood, 1 Ala. 429; 2 Brock, 64; 17 S. & R. 438; 6 G. & J. 250; 7 Black. 413; 6 M. & W. 214-15.

2. One authorized to fill up a blank is a special and limited agent, and if he exceeds his authority, his principal is not bound. Story on Agency 115.—Fisher & Johnson v. Campbell, 9 Por. 210; Gullett v. Lewis, 3 Stew. 23.

PARSONS, J.—The contract was made between the defendant and the plaintiff's agent. At the time of the contract, the defendant was in the act of leaving for Virginia, and informed the agent, that he had left a blank with his signature, with Mr. Whitworth, who would sign as his surety, and requested the agent to fill it up for the hire according to the agreement; and the agent proved on the trial, that it was done accordingly, but stated expressly, that nothing was said about the character of the instrument, nor whether it was to be under seal or not. The bill of exceptions is rather obscure in some respects, but it is to be construed most strongly against the plaintiff in error. Our inference from it is that the blank was filled up so as to make it an instrument under seal, by the agent, in the absence of the defendant. It is clear that it did not bind him.

Let the judgment be affirmed.

SLOAN *vs.* McKINNEY, ADM'R.

1. An administrator is chargeable on final settlement with money received by him after his removal from office, from an attorney who had collected it on debts of the estate, which had been placed in his hands for collection by the administrator before his removal.

ERROR to the Court of Probate of Limestone.

The Court of Probate charged Sloan, on the final settlement of his administration on the estate of Wm. L. Harris, deceased, with the sum of four hundred dollars, which he had received in November, 1849, from an attorney in whose hands he had placed certain debts due the estate, while he was acting as administrator. Sloan was removed from the administration in March, 1849, and the attorney afterwards paid the money to him without notice of his removal.

R. C. BRICKELL, for plaintiff in error:

1. There was no conversion of the assets until after the plaintiff in error had been removed from the administration.—1 Will. on Ex. 779-787; 2 ib. 1765.

2. Upon the removal of the plaintiff in error, all the assets of the estate, remaining in specie, unconverted or unadministered, passed to the administrator *de bonis non*, to whom also were transferred all rights, whether in suits pending, judgments recovered or otherwise.—Clay's Dig. 221, § 4; 227, § 30; 7 Ala. 478; 11 ib. 872; 9 ib. 721; 17 ib. 765. The collection of the money by the plaintiff in error was illegal, unauthorized, and not *virtute officii*.—12 Ala. 105; 7 ib. 478.

3. The jurisdiction of the Probate Court over an administrator terminates with his legal authority over the estate. Clay's Dig. 226, § 27; ib. 229, § 41; 13 Ala. 329; 13 ib. 781.

4. Nor can the decree of the Probate Court be sustained under the Act of 1846, which only confers power upon the court to decree in favor of the administrator *de bonis non*, for such balance as before the passage of the act was decreed to the heirs or distributees.—The cases of Driver v. Riddle, 8 Por. 343, and Gayle v. Elliott, 10 Ala. 264, do not conflict with this position.

E. J. Jones, *contra:*

1. The inventory was sufficient to charge the administrator with the debt in question, (10 Ala. 613; 16 ib. 45;) and he could only avoid being so charged by sufficiently accounting for it, which he failed to do.

2. The attorney was Sloan's agent, and the receipt of the money by him was a receipt by Sloan.—2 Greenl. Ev. 104, § 125. It does not appear when the money was paid to the attorney, and the presumption must be, that it was paid prior to Sloan's remova.—1 6 Ala. 801; 1 ib. 517; 1 ib. 582.

3. The conduct of Sloan amounted t oa conversion.—8 Por. 193.

4. The statute gives an administrator the power to resign, but it makes him and his securities responsible for all assets not duly administered, or delivered to his successor.—Clay's Dig. 222, § 9; Gayle v. Elliott, 10 Ala. 264; Driver v. Riddle, 8 Por. 344; 12 Ala. 107.

DARGAN, C. J.—An administrator-in-chief who has resigned or been removed from office, is bound to account for all assets that have come to his hands, whether they remain in specie, or have been converted by him; and under the act of the 4th of February, 1846, a decree may be rendered against him by the Court of Probate in favor of the administrator *de bonis non*, for any balance found to be due from him to the estate which he represented. It is therefore immaterial to enquire, whether the money was collected by the plaintiff in error, before or after his removal from office. He received the debt as assets of the estate, and was bound to account for it upon his removal from office. This he could have done by surrendering the debt to the administrator *de bonis non;* but refusing to do this, and receiving the money after his removal, he was bound for the debt, and was properly made to account for it in the Court of Probate.

Let the decree be affirmed.

HUNT & HUNT *vs.* BARFIELD.

1. A subsequent parol agreement which is founded on no new consideration, and has been productive of no injury to the party who was to perform it, is not a waiver or discharge of a prior written contract, unless such subsequent agreement has been executed.

ERROR to the Circuit Court of Marengo. Tried before the Hon. Jno. D. Phelan.

BROOKS for plaintiffs in error:

1. The charge of the court assumes that the giving of the note by Hunt and his promise, made some eighteen months afterwards, to carry the gin to Greensboro' to be repaired, was a waiver of all his rights under the written contract, and bound him to pay the entire note and interest, which is clearly erroneous.

The giving of the note could not be considered a waiver of any right under the contract, for he gave it upon the express agreement, that he might still rely upon the contract; and the agent persuaded Hunt to do so, clearly intimating that Mather, the payee, would soon comply with his part of the contract. To enforce the collection of the note, or to insist that Mather was thereby discharged from his obligations, would be a gross fraud upon Hunt.

But Mather was not thereby discharged from his obligations; it remained his duty to repair the gin, or supply its place with a good one in a reasonable time. Yet eighteen months elapsed, and he did neither. Hunt then had a right of action against him for the breach of contract, or a right to defend any action brought upon the note.

2. What did Hunt do to forfeit his right of action or defence? The charge implies that his promise eighteen months after the breach of the contract to take the gin to Greensboro' to be repaired at the expense of Mather, and his failure to do so, worked this forfeiture, and bound him to pay the whole note and interest. A right of action once vested cannot be waived or discharged by any act of the injured party, short of a release or acceptance of something in satisfaction.—Leavitts v. Smith, 7 Ala. 182, and cases there cited. Hunt was not bound by the

contract to have the gin repaired, or to take it to Greensboro', and therefore his promise was merely gratuitous.

The plaintiff was not entitled to recover at all, until he had complied with his part of the contract. But at most, Hunt was not bound to pay the whole amount for the defective gin. Under no circumstances, should he be required to pay more than its value.

JOHN, *contra:*

1. The charge of the court is correct. If the gin was not such as was warranted, he was bound both by law, and the express terms of the warranty, to give immediate notice, or return the gin; and if he did not, but continued to use the gin, and gave his note, he waived the warranty.—Fisher v. Sumda et al. 1 Camb. 190-193; Adams v. Richards, 2 H. Black. 573; Rowe v. Osborne, 1 Star. 140.

2. Hunt's agreement to take the gin to Greensboro' altered the obligations of the parties, and is binding upon him. (If this agreement is not binding for want of consideration, then the agreement to extend the warranty is also void for the same reason; both occupy the same ground.)—Warren v. Mains, 7 John. 476-477; Betts v. Perine, 14 Wend. 219; Brindly v. Tibbets, 7 Greenl. 70; Adams v. Davis, 16 Ala. 748; Story on Contracts, 24, § 33; Philips on Ev. 3 Cow. & Hill's notes, 1479-1481.

3. "Either party may waive any right introduced into or provided by the contract, either expressly or tacitly, by acts or declarations fairly indicating a relinquishment of any provision or part of a provision, and without the performance of which, unless relinquished or waived, a recovery could not be had."—Shaw v. Turnpike Co. 2 Penn. 454. This case fully covers the entire charge, and the refusal to charge as requested.

4. There is no analogy between this case, and the case of Leavitts v. Smith, et al. 7 Ala. 175, and is not embraced by that class of cases. The release of the right of action is entirely different from a waiver of damages, or the alteration of the terms of a contract.

DARGAN, C. J.—The objection to the recovery in this case is, that the consideration of the note sued upon had partially

or totally failed; we must therefore look to the evidence showing the consideration, and ascertain whether there has been a failure in whole or in part. In 1846, T. Mather, the payee of the note, and Hunt entered into a written agreement, whereby it was agreed that Hunt should buy of Mather a cotton gin, of a description specified in the contract. But if the gin did not perform well, when started, Hunt was to give as early information as he could to Mather, who was to cause it to perform well, or supply him with another that would. It was further agreed, that as soon as the gin was started and performed well, Hunt was to give his note to Mather for one hundred and fifty dollars, payable on the first day of January, 1848. The evidence further shows that in pursuance of this agreement, Mather delivered to Hunt a gin in the month of October, 1846, and in November thereafter, the agent of Mather called on Hunt for the note. Hunt told the agent that he was not satisfied with the gin, that it made a fine sample, but ginned too slowly, and objected to giving his note. The agent examined the gin, and saw that it did not perform well, but ginned too slowly, but he could not alter it at the plantation of Hunt, and thought it would have to be sent to Mather's shop, which was about eighty miles distant. The agent, not wishing to return again for the note, induced Hunt to execute it, telling him that he would see Mather, and let him know the condition of the gin. The agent saw Mather in two or three months afterwards, and informed him of its condition, but it does not appear that any thing more was said or done in reference to the gin, until the spring of 1848, when another agent of Mather called on Hunt, who told him that the gin did not perform well, and some part of it was broken, and therefore he could not use it. He further stated, that Mather ought to have the gin put in good order. The agent saw Mather afterwards, and told him what Hunt had said. Mather then requested his agent to say to Hunt, that if he would send the gin to the shop of Mr. Dubois at Greensboro', which was about forty miles distant from the residence of the defendant, that he would have the gin put in good order. The agent told this to Hunt, who agreed to do it, but never has carried the gin to the shop of Mr. Dubois, and it has never been repaired.

It is contended by the counsel for the plaintiff, that the failure of Hunt to carry the gin to Dubois' shop discharged Mather

from his obligation to repair it, so as to make it perform well; but we cannot yield our assent to this proposition. True it is, that a parol agreement which has been executed will discharge an antecedent contract when so intended by the parties, whether such prior contract rests in parol, or is under seal.—Wallis v. Long, 16 Ala. 738; Barville & Martin v. Conner, 6 Ala. 617, and cases there cited. But the general rule is, that a subsequent parol agreement will not discharge a prior written contract, unless such agreement has been executed.—Adams v. Nicholas, 19 Pick. 275.

I will not say, however, that a parol executory agreement can in no case be considered as a waiver or a discharge of a written contract; but if such executory agreement be founded on no new consideration, and has been productive of no injury to the party who was to perform it, I cannot see how it is to discharge him from the performance of an absolute and perfect obligation. Mather, the payee of the note, was absolutely and unconditionally bound to repair the gin, before Hunt agreed to carry it to the shop of Dubois; and Hunt's failure to do so, (his promise being founded on no new consideration) cannot release Mather from the performance of his part of the original contract. Mather therefore has not fully complied with the agreement which formed the consideration of the note, and consequently, there has been a partial failure of consideration, and the plaintiff can only recover the amount of the note with interest thereon, less the sum that it would have cost to put up the gin in good repair at the time it was first started. This being, in our opinion, the rule that must govern the amount of the recovery,it follows that the court erred in the instructions given to the jury, and the judgment must be reversed, and the cause remanded.

CHAPMAN *et als. vs.* HAMILTON *et als.*

1. If a person having an incumbrance or security upon an estate conceals his interest, and thereby enables the owner of the estate to obtain an additional advance upon it, he will be postponed in a court of equity, to the second incumbrancer.
2. A demurrer to a bill for the want of parties must show who the proper parties are, in such a manner as to point out the defect in the bill, and enable the complainant to amend it.
3. To a bill which seeks to subject to the satisfaction of the complainant's claim, the undivided interest of a distributee in an estate while yet in the hands of the administrator, all the distributees are necessary parties.
4. When a bill is demurrable on its face, for the want of proper parties defendants, and the defendant, instead of demurring alone, answers, and shows by his answer, that there is no other necessary party, the court may proceed to a final decree, without regard to such a formal defect in the bill.
5. If a creditor who has a lien upon two funds for the security of his debt, files a bill seeking to condemn one of them, the bill is not *demurrable*, because it does not show what disposition has been made of the other.
6. A decree will not be reversed, because a party defendant, who has in his hands the fund sought to be condemned, is sued as *administrator*, instead of *guardian*, when it appears that the estate has been settled; that all the parties interested in the fund are before the court; and that no injury has been done to any one.

Error to the Chancery Court of Macon. Tried before the Hon. W. W. Mason.

Gunn & Willis, for plaintiff in error:

The demurrer to the bill should have been sustained by the court below—

1st. Because the bill did not state any disposition by complainants of the stock of shoes, &c. conveyed by Clough to secure their demands, or that the same was insufficient security. It does state that the complainants had two funds to which they could resort, while defendant, Gwinn, had but one; yet it does not (while it asks to have Gwinn postponed) aver that the fund on which he had no lien had been exhausted, &c. They who seek equity ought to be required to show in their pleadings that

they have done equity.—Nelson & Hatch v. Dunn et al., 15 Ala. 517, section 10, and cases therein cited.

2d. Because the bill did not aver that the distributive share of Clough in the estate of his deceased father had been ascertained by the decree of the Orphans' Court of Macon. It predicated the complainants' right to have Gwinn postponed and their deed enforced, upon a contract, which, according to the allegations of the bill, did not give them a power of sale or the right to possess themselves of such share until it had been so ascertained. See 3 Powell on Mort. 965; Bishop's Heirs v. Adm'r & Heirs of Bishop, 13 Ala. 475; Delage et al. v. Hazard et al., 16 ib. 196; Story's Eq. Pl. §§ 257, 257 *a*, and 258; 1 Dan. Ch. 369-77, n. 2.

3d. Because it did not make all the distributees of the estate of E. N. Clough parties defendants. It alleged the existence of other distributees, but did not make them parties.—See Hartly v. Bloodgood, 16 Ala. 233; Whiting v. B'k U. States, 13 Pet. 14; Story's Eq. Pl. 202; Cooper's Eq. Pl. 33-185; 1 Dan. Ch. P. 384 to 388; 2 ib. 37-8.

The bill ought to have been dismissed by the court below—

1st. Because it appeared from the proofs that it was prematurely brought.—See authorities above referred to, under the second reason assigned in support of the demurrer.

2d. Because there was no equity in it.—See authorities last referred to, as well as those cited under first reason above given in support of demurrer.

3d. Because it did not make the necessary parties defendants. See authorities cited above, in support of the third reason given in support of demurrer.

The bill ought to have been dismissed as to Chapman, upon his answer that he was not administrator, but guardian, or else the cause continued and leave given complainants to amend, the proofs having been contradictory to the answer in this respect.—See Mitford Eq. Pl. 235; Story's Eq. Pl. § 732; Cartwright v. Hately, 1 Ves. jr. 292.

The order of reference should have directed the master to allow Chapman a reasonable compensation for the management of the interest of defendant, Clough, in the estate of his deceased father, and also the expenses attending the defence of the cause. See Phillips, &c. v. Thompson, &c. 9 Port. 664; Carroll et al. v. Moore et. al., 7 Ala. 617.

The petition of Chapman for a further reference should have been granted. There was no ground for exception to the report of the master; that conformed fully to the directions in the order of reference.

The decree against Chapman for the sum paid Gwinn before he was notified of the deed in favor of complainants, is wholly indefensible. No execution is ordered against him for this sum, it is true, but this does not justify the decree.

McIver & Hamilton, *contra:*

The deeds of defendant, Gwinn, must be postponed to complainants', because if under the proof he is not bound by his silence, he is estopped by his representations.—Story on Con. 6, § 12, and cases cited in Note; Juzan v. Toulmin, 9 Ala. 662; Wendell v. Van Rensselaer, 1 Johns. Ch. 354; Hobbs v. Norton, 1 Vernon, 136; 2 ib. 450; 1 Bro. Ch. 546; 2 ib. 388; 6 Ves. 173; Story Eq. 376, and cases cited; Bac. Ab., Fraud, B.

The decree, then, of the chancellor, is correct. The defendant, Gwinn, is properly charged with the amount received before notice to Chapman, and jointly with Chapman, with amount paid him by Chapman after notice; and if not certain, it can be rendered so without doing violence to its meaning or language—"*certum est quod certum reddi potest.*"

As to defendant's objection that the bill is prematurely brought, there is no allegation in the bill which will preclude complainant from showing that the estate had been settled, and the objection cannot now avail.

The decree is as favorable to defendants as it could be under the proof, and this court will not reverse when the record shows the successful party is entitled to the judgment, and no injury results. Ransom, adm'r, v. Quarles, 16 Ala. 437; 1 Cranch, 132; 3 Litt. 15; 2 Pet. 354; 4 Cowen, 674-80; 1 Gall. 400; 5 Amer. Dig. 177.

The question as to the duty of complainant to show that the fund upon which Gwinn had no lien had been exhausted, cannot arise under the pleadings.

DARGAN, C. J.—The facts, so far as the merits of this controversy are involved, may be thus stated: James M. Clough being entitled to an undivided fifth part in his father's estate, did, on the 7th day of October, 1843, convey the same by way

of mortgage to Joseph C. Gwinn to secure the payment of eight hundred and fifty dollars, and on the 17th day of February, 1844, executed another mortgage on the same interest to Gwinn, to secure him in the payment of one thousand and fifty dollars. On the 21st of May, 1844, Baldwin & Gray, being about to sell a stock of boots and shoes to said Clough, required of him security for the payment of the money agreed to be given for them, which amounted to six thousand eight hundred and fifty dollars and thirty-two cents. Clough proposed to execute a deed of trust on the stock of goods about to be purchased by him, and also on his undivided interest in his father's estate. Baldwin & Gray being strangers to Clough and ignorant of his interest in the estate of his father, applied to Gwinn for information as to the nature and extent of that interest. Gwinn informed them that Clough had an undivided interest in his father's estate, worth from twenty-five hundred to three thousand dollars, and that he thought the security proposed to be given by Clough was good, but did not disclose to Baldwin & Gray the mortgages which he held on the undivided share of said Clough.

There can be no doubt of the propriety of the chancellor's decree, in postponing the mortgages of Gwinn, and giving priority to the deed of trust executed by Clough to secure Baldwin & Gray; for the rule is as well settled as it is just, that if one having an incumbrance or security upon an estate conceals his interest, and thereby enables the owner to procure an additional advance upon it, he must be postponed to the second incumbrancer.—Mocatta v. Murgatrayd, 1 P. Wms. 393; Berrisford v. Melward, 2 Atk. 49; 1 Story Eq. § 390, and cases there cited. When Baldwin & Gray applied to Gwinn for information respecting the interest of Clough in his father's estate, it was his duty then to disclose the incumbrances or liens which he had upon it, and his failure to do so is such a fraud in the view of a court of equity as justly postpones his mortgages to that of the complainants.

2. But it is contended that all the proper parties defendants are not before the court, and that for this reason the demurrer to the bill should have been sustained. But the demurrer itself is defective, in not setting forth who are the proper parties defendants. The rule is, that a demurrer for want of parties must show who the parties are, not by name, for this the defendant

might not be able to do, but in such manner as to point out the defect in the bill, and to enable the complainant to amend it.—1 Dan. Ch. P. 335; Story Eq. Pl. § 543. For this defect in the demurrer, it was properly disregarded, inasmuch as the court could, according to the case as made by bill, answer and proof, proceed to a final decree without affecting the interest of any of the absent parties. There are cases, it is true, in which the court, *ex mero motu*, will take the objection of the want of proper parties, or it may be insisted on at the hearing, although the objection was not made, either by plea or demurrer.—Story Eq. Pl., § 236. But in such cases the interest of the absent parties would be affected by the decree, or a complete and valid decree could not be rendered without their being before the court as parties. But in the case before us, it is shown by the answers and proof, that a division of the estate of Edward Clough had been ordered by the Orphans' Court, and the share of each distributee set apart and allotted to him; consequently it was not necessary to have the other distributees before the court. The bill itself does not show this, and had it been defended by a proper demurrer only, the objection must have been sustained. But when a bill is demurrable on its face for the want of proper parties defendants, and instead of demurring alone, the defendant answers and shows by his answer that there is no other necessary party, the court may proceed to a final decree, without regard to such a formal defect in the bill. It is true that under our practice a defendant may insist on the benefit of a demurrer, notwithstanding he has fully answered the bill; but when the ground of demurrer is the want of parties, and the answer shows that all the proper parties are before the court, there can be no good reason why the complainant shall be compelled to amend his bill, *or that it should be dismissed;* for, the court being in possession of all the facts, and all the necessary parties *being in truth before the court*, there can be no error or impropriety in proceeding to a final decree. Independent then of the defect in the demurrer itself, the objection for the want of parties was properly disregarded.

It is also insisted, that the bill is defective because it does not show what disposition has been made of the stock of goods conveyed to secure Baldwin & Gray. It is true, that if a party has a lien upon two funds to secure a debt, another person, hav-

ing a junior lien on one of them only, may compel the former to resort, in the first instance, to that fund not bound by his junior lien.—1 Story's Equity, 588; Eden on Injunc. 62; Dorr v. Shaw, 4 Johns. Ch. 17; Nelson & Hatch v. Dunn et al., 15 Ala. 501; 8 Ves. 388. But as the creditor having the elder lien has the unquestionable right to subject both funds to the payment of his debt, if necessary to its satisfaction, his bill seeking to condemn *the one* is not subject to a demurrer because it does not show what disposition has been made of the other. The creditor having the junior lien should insist on this defence in his answer, and then the court will so marshal the securities that both debts may be satisfied, if the property be sufficient for that purpose. But in the case before us, Gwinn, who alone is interested in this question, does not insist upon it, either in his answer or by demurrer; and it is perfectly clear that it cannot be raised by the demurrer of Chapman.

It is, again, contended that the bill should have been dismissed as to Chapman, because he is sued as the administrator of Edward N. Clough, and it appears that he is not, but that he holds the funds as the guardian of James M. Clough. As a general rule, it is certainly true, that one sued as an executor or administrator may show in defence that he does not bear that character.—Story's Eq. Pl., § 732. But I can see no good reason in allowing the defence in this case. It does not appear when Edward N. Clough died. But his widow, who was appointed his administratrix, died in the year 1836 or 1837. There is no proof showing that after her death any one else was appointed administrator, nor is it pretended that there are any debts outstanding against the estate of the deceased. In 1842, the defendant, Chapman, was appointed guardian of the minor heirs of Edward N. Clough, and as such guardian came into the possession of the property, and from then until now his title as guardian has never been disputed, nor his possession disturbed. He has also made a final settlement of his accounts as guardian, and, we think, under these circumstances, it is but reasonable to suppose that the estate of Edward N. Clough has been fully administered, and that Chapman is rightfully in possession of the property as guardian. As he is before the court, as well as James M. Clough, no injury can be done any one by proceeding to a final decree. Justice has been done between the parties,

and no injury can result to any one else from the decree. I therefore think it ought not to be reversed because the defendant, Chapman, is styled in the bill administrator of Edward N. Clough, instead of guardian of James M. Clough.

Let the decree be affirmed.

HATTON *vs.* WIER.

1. A Joint Resolution of the General Assembly of the State, by which a married woman is authorized "to take, receive and hold, by gift, purchase or inheritance, any property, real or personal, free from the molestation, hindrance or authority of her husband, and free from any liability to pay his debts or contracts, and the same to dispose of, by will, gift or sale, in the same manner as if she were a *feme sole*," does not subject her to be sued at law, upon any contract entered into for the purchase of property.
2. *It seems* that the remedy of her creditor is by bill in equity, to subject her separate estate to the payment of his debt.

ERROR to the Circuit Court of Pickens.

J. L. MARTIN, for plaintiff in error.

1. The plaintiff insists that the statute set out in the replication does not make the plaintiff in error a free dealer; and being in derogation of common law and common right, must be strictly construed.

2. That to reach the separate property of married women, resort must be had to a court in equity; that a suit at law cannot be maintained.—Vance v. Wells, 6 Ala. 737; 3 Ala. 557; 9 Ala. 855; 1 Chitty, 476; 17 Ala. 802; 2 Saunders, P. & E. 570-72; 4 Por. 48.

3. That it was error to give judgment on overruling the demurrer, whilst there was an issue in the record undisposed of.—Thomas v. Brown, 1 Stewart, 412.

HUNTINGTON, *contra.*

DARGAN, C. J.—This suit is brought on a note executed by the defendant, and payable to the plaintiff, dated the 17th of March, 1847, and due the first of January, 1848.

The defendant pleaded her coverture at the time the note was made in bar. The plaintiff replied the following joint resolution, passed by the General Assembly of the State of Alabama, on the 13th of December, 1845, "That it shall be lawful for Lucy Hatton of the county of Pickens, wife of John L. Hatton, to take, receive and hold, by gift, purchase, or inheritance, any property either real or personal, free from the molestation, hindrance or authority, and free from any liability to pay the debts or contracts of her husband, the said John L. Hatton, and the same to dispose of by will, gift or sale, in the same manner as if she were a *feme sole*." The replication also averred, that the note sued on was given by the defendant in the purchase of property from the plaintiff, since the passage of the above recited act. To this replication there was a demurrer, which was overruled, and this is the only assignment of error that we deem worthy of notice.

By marriage, the legal existance of the wife is incorporated into that of the husband, and they are said to be one person in law.—Black. Com. vol. 1, 442. She can do no act, and enter into no contract, that will bind her; consequently, if she gives a promissory note, or becomes a party to a bill of exchange, it cannot create a personal obligation upon her at law to pay.—Vance v. Wells, 6 Ala. 737.

This principle of the common law is not denied. But it is contended that the act of the Legislature, passed in the form of a joint resolution, whereby the defendant was authorized to acquire and hold property as a *feme sole*, either by gift, purchase or inheritance, subjects her to be sued at law, upon any contract entered into for the purchase of property. But we think such a construction of the act would be far beyond the intention of the Legislature. The defendant was only authorized to acquire, hold and dispose of property as a *feme sole*, not to create legal liabilities by contracts, upon which she could be sued at law. The remedy of the plaintiff is by bill in equity, to subject the separate estate of the defendant, if any she has, to the payment of his debt. But he cannot under the authority of this act maintain a suit at law against her upon the note. The court erred in overruling the demurrer, and the judgment must be reversed, and the cause remanded.

HUGGINS *et al. vs.* POWELL.

1. The act of 1848 (Pamphlet Acts, p. 95,) repeals the Act of 1845, (Pamphlet Acts, p. 62,) in reference to motions against officers for failing to return executions, and three days notice of the motion must now be given before judgment can be rendered against the officers for such default.
2. The act of 1848 authorizes a judgment against an officer for failing to return an execution, of only twenty per cent. on the amount of the execution.

ERROR to the Circuit Court of Dallas. Tried before the Hon. Nathan Cook.

Motion against a sheriff for failing to return an execution.

GIBBONS, for plaintiff in error.

PEGUES, *contra*.

DARGAN, C. J.—The proceedings in this case were conducted in conformity to the act of the 27th of January, 1845, without notice to the sheriff, or any of his securities, and the judgment is for the entire amount of the execution, which the sheriff failed to return. The judgment cannot be sustained, for by the act of the 3rd of March, 1848, the sheriff is entitled to three days notice of a motion against him for failing to return an execution.—See pamphlet acts of 1848, p. 95. In this case no notice was given to him, or to his securities, but on the call of the execution docket, on the first day of the term, it was suggested to the court, that the motion would be made, and the motion was then entered on the motion docket, and set for trial. The act of 1848 repeals the act of 1845, in reference to motions against officers for failing to return executions, and they must now have three days notice of the motion before judgment can be rendered against them for such default.

The judgment is also erroneous in amount. The act of 1848 allows a recovery only of twenty per cent. upon the amount of the execution which the sheriff failed to return.

Let the judgment be reversed.

LOWREMORE *vs.* BERRY.

1. In action of trover for the conversion of a promissory note, the plaintiff may recover upon proof of his previous possession of the note, notwithstanding the legal title to it, and the right to sue for the money due thereby, are shown to be in another person. If the defendant would protect himself by showing an outstanding title in another, he must connect himself with it, by showing that he acted under the authority of the real owner.
2. Trover will not lie for the conversion of a promissory note, after it has been paid, or legally discharged in any manner.
3. But if the note has not been paid, or legally discharged, trover will lie for its conversion, although the word, "paid," has been written across the face of it by mistake, or by one without authority.

ERROR to the Circuit Court of Fayette. Tried before the Hon. Samuel Chapman.

THIS was an action of trover brought by the plaintiff against the defendant, to recover the value of a promissory note. On the trial it was proved that the note was made by E. A. Montgomery, payable to John Newton or order. It also appeared that this note was delivered to one, who was examined as a witness, to be collected, and the money to be applied to the payment of a judgment in favor of the witness against the plaintiff. The witness failed to collect the money, and having an execution against the plaintiff, he gave the note to a constable, who levied the execution upon it as the property of the plaintiff, and sold it. The defendant purchased it at the constable's sale, and offered to give it up to the plaintiff, if he would pay him the amount which he had given for it at the sale. Upon this evidence, the court instructed the jury that the plaintiff could not recover.

COGGIN, for plaintiff.

PECK, *contra.*

DARGAN, C. J.—It is admitted by the counsel for the defendant, that the note was not subject to levy and sale, and that the defendant obtained no title to it by his purchase. But it is contended, that as the note was not endorsed by the payee, the legal title is still in him; consequently that the plaintiff cannot

recover, because he failed to show any legal title to the note. If the action had been founded on the note, this objection would have been fatal to the plaintiff's right to recover. But it is not. The gist of the action is the wrongful conversion, and we think the principle is well settled, that possession alone is sufficient evidence of title to enable the plaintiff to recover in an action of trover, against a wrong doer, although the title to the chattel may not be in the plaintiff, but in another; and if the defendant would protect himself by showing an outstanding title in another, he must connect himself with it, by showing that he acted under the authority of him who was in fact the owner. In the case of Joyce v. Dozier, 8 Por. 303, it was held that the mere prior possession was sufficient to sustain the action of detinue against a trespasser, and that he could not defend himself by showing an outstanding title in another, without in some manner connecting himself with such title. To the same effect is the case of Duncan v. Spear, 11 Wend. 54. We think the principle recognized by these cases is decisive to show that the plaintiff might have recovered, if he had satisfied the jury of his previous possession of the note, notwithstanding the legal title to the note, and the right to sue for the money due thereby, were shown to be in the payee.

It may, however, be contended that the note was paid, as the word "paid" was written across the face of it, and that therefore the action cannot be maintained. If the note in truth was paid before the conversion, or in any manner legally discharged, then we admit that trover will not lie to recover the value of it, for in fact it would have no value; but if the word "*paid*" was written across the face of the note by mistake, or by one without authority, this would not discharge the maker from his obligation to pay, and consequently, trover would lie for its conversion; and we think the circumstances of this case were such as required the question of payment to have been left to the jury to determine.

The court erred in the instructions given to the jury, and the judgment must be reversed, and the cause remanded.

WEIR *vs.* CLAYTON.

1. The title of one who claims under a purchase at a sheriff's sale, made by virtue of a "*venditioni exponas*" from the Circuit Court, cannot be collaterally impeached, on account of irregularities in the proceedings upon which the order of the Circuit Court is founded.
2. An order of sale made by the Circuit Court, which recites the issuance of an execution by a justice of the peace of the county in which the lands lie, and its levy by a constable of that county, and also states the numbers of the land, is sufficient, although it does not designate by name the county or the district in which the lands lie.

ERROR to the Circuit Court of Benton. Tried before the Hon. L. P. Walker.

THIS was an action of trespass to try titles to certain lands, instituted by the plaintiff against the defendant in error. The defendant claimed under a sheriff's sale.

RICE & MORGAN, for plaintiff in error:

1. An order of the Circuit Court to sell land levied on by a constable under an execution issued by a justice of the peace, is not a final judgment, nor in the nature of such judgment. It is at most only a confirmation of the levy. It cannot add to the levy any matter which is not shown in the levy, but which the statute makes essential to the validity of the levy. A mere confirmation of a void levy cannot impart vitality to such levy.—White v. Shannon, 3 Ala. 286.

2. A sale of land by a sheriff under such order of a Circuit Court, is essentially different from a sale of land by a sheriff by virtue of process issued under the judgment of a court of record. The former is the mere execution of a power, (conferred by the statute only in certain cases,) the validity of which depends on an act *in pais;* the latter is a judicial sale.

3. The levy of the constable in this case is void. To make it valid, it was necessary that it should affirmatively appear in the proceedings, that the state of facts existed, upon the existence of which alone the statute authorized him to levy. No presumption can be indulged in this class of cases.—Pope v. Headen, 5 Ala. 433; 1 Cowper, 111—see cases cited on brief in

Commissioners' Court v. Sabra Thompson, in Supreme Court. Notice of the levy, either actual or constructive, was essential. McCurry v. Hooper, 12 Ala. 823; Commissioners' Court v. Sabra Thompson.

4. The levy being void, the order of court and sale are also void—for the Circuit Court has jurisdiction or authority to order a sale only on this condition—"if it shall appear that the proceedings are regular."—Clay's Dig. It cannot acquire jurisdiction by saying the proceedings did appear regular, when in truth they did not appear regular.

Motion to set aside a void sale is not proper.—Mahone v. Nuckolls, 15 Ala. 212.

The orders of sale made by the Circuit Court of Benton county are void on their face,—because they do not show that the land levied on was in Benton county, nor mention the land district in which it was situated, nor give any description which would enable any court to pronounce that the land did lie in Benton county. Nor do they show that notice of the levy was given as required; and there is no authority to the sheriff to sell.—See cases above cited—see also, cases cited for defendant in error, in the case of Pollard v. *Doe ex dem.* Cocke, at this term.

J. B. Martin, *contra:*

The order of sale by the Circuit Court, (though irregular,) cannot be collaterally impeached. If there be such irregularities, either int he judgment, *ven. ex.*, or in the proceedings of the sheriff under them, they can only be taken advantage of in a direct proceeding to set aside the sale.

Every reasonable intendment is to be made in favor of the judgment, and if notice to the defendant be necessary, or if it was necessary to show a want of sufficient personal property, it must be presumed in this collateral suit that these things were proved.—Clay's Dig. 207, § 31; Lessee of Glover's Heirs v. Ruffin, 6 Ohio, 255; Buckingham v. G. Alexa. Society, 2 ib. 454; Ward v. Saunders, 6 Ired. 382; Burks v. Elliot, 4 ib. 355; Smith v. Houston, 16 Ala. 111; Love v. Powell, 5 ib. 58; Cockerell v. Wynn, 12 S. & M. 123.

There is a clear distinction between a sale by the sheriff, whose authority for selling is the execution, and who need only look to

it, so far as his own justification or the title of the purchaser is concerned, and a sale by a tax-collector, whose entire authority is based upon the statute, and which therefore must be strictly pursued.—President & Select Men of Natchez v. Minor, 10 S. & M. 246.

It cannot be successfully maintained that the orders of the Circuit Court were void. The Circuit Court certainly had jurisdiction of the subject matter. The granting of an order of sale is an *ex parte* proceeding, intended to perpetuate the evidence of the justice's judgment for the protection of the purchaser. If there be any irregularity in the proceeding, the defendant in execution is not without his remedy.—White & Bingham v. Shannon, 3 Ala. 286.

PARSONS, J.—The land was sold by the sheriff in 1839, under orders of the Circuit Court of Benton, made upon the returns of a constable on three executions issued by a justice of the peace. Luckey was a defendant among others, in each of the executions, and the legal title to the land was in him. The defendant claims by a regular chain of conveyances from the purchasers at the sale. The executions from the justice and the levy by the constable are recited in the orders, and the order states that the proceedings were regular.

The executions were read in evidence on the trial, and the constable's return was, "Levied the within on the N. E. ¼ of the N. E. ¼ of section 21, township 15, range 11 E., in the Coosa land district, as the property of Catherine Weir and J. P. Luckey; pointed out by the plaintiff,—16th Dec. 1838."

The act of 1818 (Clay's Dig. 207, § 31,) provides that when necessary for want of personal property to levy such executions on land, the officer levying the execution is to return it to the next Circuit Court of his county, and the court, on motion of the plaintiff, "and it appearing by an exhibition of the proceedings before the justice, that the same have been regular," is to order a sale of the land, or whatever part thereof may be necessary to satisfy the execution. The plaintiff's counsel contend that the defendant's title is bad, because it does not appear that there was a want of personal property, or that the defendant was notified of the levy.

But he attacks the title collaterally, which cannot be done up-

on the ground of any such irregularities.—Ware v. Bradford, 2 Ala. 676; Love & Williams v. Powell, 5 ib. 58.

It is contended that the orders are void, because they do not show that the land was in Benton county, or mention the land district. But they recited an execution issued by a justice of Benton and levied by a constable of Benton, and then state the numbers of the land. This we think was sufficient.

If the defendants in execution were injured by the irregularities, they had a direct remedy, and upon that they must rely.

The judgment is affirmed.

HARRELL *vs.* WHITMAN.

1. An issue tendered by the plaintiff in an attachment suit, contesting the answer of a garnishee, which avers "that the said garnishee is indebted to the said defendant in attachment, and was at the time of the service of the garnishment," is sufficient.
2. The plaintiff in attachment can only subject, by process of garnishment, such debts as the defendant might recover by suit at law in his own name.

Error to the County Court of Lowndes.

I. F. Stone, for plaintiff in error:

1. The proceeding by garnishment in point of law, is the institution of a suit, and is governed by the same general rules of law applicable to other suits.—S. & E. Travis v. Tartt, 8 Ala. 574. It is a legal and not an equitable proceeding.—Thomas v. Hopper, 5 Ala. 442.

2. The attaching creditor is merely substituted to the legal rights of his debtor, and can only recover against the garnishee, where the debtor himself could recover; see the authorities above cited.

3. If Powers had brought suit against the garnishee, would the note as set out in the bill of exceptions have been admitted

as evidence for him? It certainly would not, and this point has been expressly decided in Taylor v. Acre, 8 Ala. 491.

4. The note as set out in the bill of exceptions was not admissible, as contended for by the defendant in error in his petition for a re-hearing. And if testimony which is inadmissible and improper, is permitted by the court to go to the jury, the appellate court will not presume the proof of circumstances, (not appearing in the bill of exceptions) which would render such testimony legal.—Smith v. Maxwell, 1 Por. 221.

5. If the bill of exceptions states enough to put the court in error, then the court should insert what is necessary to put itself right, if the circumstances will admit, and if it fails to do so, no presumption can be indulged by the appellate court, to sustain its judgment.—17 Ala. 415.

The bill of exceptions is explicit in stating, that the handwriting of the garnishee to the note was proved, and that it proved to have been in the possession of Powers, before the commencement of the suit. Can it then be possible that the judge would sign a bill of exceptions, which omitted as important testimony as an indorsement of the note or a direct promise to pay the same to Powers, (the defendant in attachment.) If he would, this court will not aid him with the presumption, that such indorsement or promise to pay was in evidence.—See the case of Smith v. Maxwell, 1 Por. 221, above cited.

Stone & Judge, *contra:*

1. On the subject of the issue, the authorities relied on are in cases where defendant in execution contests the answer.—Graves v. Cooper, 8 Ala. 811.—Twelves v. Ladono, 15 Ala. 732. When plaintiff in execution contests, no formal issue is required, other than the statutory oath.—Thompson v. Allen, 4 S. & P. 184; Marston v. Carr, 16 Ala. 325.

2. The general principle is admitted, that only legal demands can be condemned in garnishment proceedings. But what are equitable demands in this connection? Surely, those which can only be enforced in a Court of Chancery. This demand is purely legal, and cannot be enforced in chancery.—Hammond v. Messenger, 9 Sim. 327. It is true, Powers had not the technical legal right to sue in his own name; but still, it was a purely legal demand. This court has frequently held, that

garnishment is a remedial proceeding, and it should be liberally expounded. Demands which are not such as the defendant can sue in his own name, have been frequently subjected in garnishment proceedings.—Lucas & Brooks v. Goodwin, 6 Ala. 831; Marston v. Carr, 16 Ala. 325.

3. Our statute, (Dig. 63, §§ 39-40,) clearly shows that garnishment is not intended to be technical in the character of demands it operates on, and the decisions, *supra*, give a liberal construction to all the remedial provisions.

4. If this court hold that demands of this nature cannot be reached by garnishment, then judgment debtors can always place their effects beyond the reach of the law, by investing them in notes not endorsed, or by taking notes payable to third persons. It is not an answer to this, that chancery can afford relief. A large majority of the cases are too small to get into chancery.

5. The affirmance of this case can not let in all classes of equitable demands. Only the one class of cases in which the defendant has not the technical legal right to sue in his own name, can come in.

6. The court cannot, in this case, presume that all the evidence given in the court below is embodied in the bill of exceptions. On the contrary, the court is bound to presume that other and sufficient evidence was given to justify the verdict. The note was clearly admissible as one link in the chain of evidence; and this court cannot know that there was not other proof, showing that Powers could have sued on the note in his own name, such as the endorsement of the note to Powers, or a promise by Harrell to pay Powers the money. The objection made was to the admissibility of the note. It should have been received, and after the testimony was closed, if the plaintiff's case was not made out, then the garnishee should have moved the court to exclude the evidence, or asked a charge upon its sufficiency.—McNeill v. Reynolds, 9 Ala. 313; Palmer v. Severance, ib. 751; Abney v. Kingsland, 10 Ala. 355. (The court is asked to look into the petition for a re-hearing, where there is an elaboration of this last point.)

PARSONS, J.—James K. Whitman issued an attachment against John Powers, and summoned German B. Harrell as a garnishee, who we infer from the record, denied any indebted-

ness to Powers, the defendant in attachment. The plaintiff contested the answer of the garnishee, and tendered the following issue: "and the said plaintiff by his attorney comes and says, that the garnishee within named, is indebted to the defendant, John Powers, and was at the time of the service of the garnishment." The garnishee moved the court to reject the issue thus tendered, and to compel the plaintiff to file a statement or allegation of the indebtedness from him to the defendant. This motion the court overruled. To show the indebtedness of the garnishee, the plaintiff proved his hand writing to a note, dated the 24th of November, 1836, due on the first day of February next thereafter, payable to Nathan Meek or order, for eighteen hundred dollars, and also proved that Powers was in possession of the note at the time the suit was commenced. The plaintiff then offered to read the note to the jury as evidence. The garnishee objected, but the court overruled the objection, and the note was read. We think the issue tendered by the plaintiff in attachment was sufficient. To require a plaintiff to file a declaration against the garnishee, setting out his indebtedness with legal precision and accuracy, might often defeat the ends of justice, as it cannot be supposed that he is always in possession of the evidence of the indebtedness, or able to describe it with the usual accuracy required in a declaration. If we were to hold that the allegation of the indebtedness was insufficient, we should be required to go the full length, that the plaintiff in tendering an issue to a garnishee who had denied his indebtedness, must aver the facts correctly, out of which the indebtedness arises. This he might be unable to do, as he has not the power to compel the defendant in the attachment to furnish him with the evidence, or to inform him of the facts, out of which the indebtedness grows. In the case of Thompson v. Allen, 4 Stewart & Porter, 184, it is said that in trying the indebtedness of a garnishee, no formal issue is required, further than an averment by the plaintiff, that he is indebted, and a denial thereof by the garnishee. There was no error in refusing to reject the issue tendered by the plaintiff.

2nd. We consider it settled by the previous decisions of this court, that the process of garnishment must be considered as a legal and not as an equitable proceeding, consequently, the defendant's rights to the fund or property sought to be condemned, must be legal as contradistinguished from equitable.—Represen-

tatives of Thomas v. Hopper, 5 Ala. 442. In the case of Travis v. Tartt, 8 Ala. 574, it was said that the proceeding by garnishment is the institution of a suit, in which the creditor is permitted to proceed against the debtor of his debtor, and therefore it would seem to be governed by the general rules, applicable to other suits. Again, in the case of Walker v. McGehee, 11 Ala. 273, it was said by the judge delivering the opinion, (although the point was not expressly decided) that "our statutes when they speak of indebtedness to the defendant in attachment or judgment, refer to such indebtedness as would enable the debtor himself to maintain debt or *indebitatus assumpsit*." Indeed, if we ever depart from the plain rule, that the attachment and garnishment can operate only on the legal rights of the defendant, there will be no stopping point, and we must go the full length, that the equitable rights of the defendant may be attached by garnishment in a suit at law, and thus a court of law will become invested with cognizance of equitable rights, and therefore bound to ascertain and condemn them, however difficult the task may be, or however incompetent the powers of the court for this purpose. It is better to hold to the plain and settled rule, that the creditor can condemn by process of garnishment only such rights of his debtor, as the debtor could recover by action at law in his own name, that is, his legal rights as distinguished from equitable. As the plaintiff in the attachment can only subject by process of garnishment, such debts of his debtor as he could recover in his own name, it follows that the court erred in not excluding from the jury the note of Harrell to Meek. It did not appear that it was endorsed, nor was there any proof that Harrell had ever promised Powers, the defendant in the attachment, that he would pay him the money due thereon. In the absence of such proof, no suit could be maintained by Powers on the note in his own name.—Taylor v. Acre, 8 Ala. 491. For this error, the judgment must be reversed, and the cause remanded.

In reference to the question of the admissibility of the admissions made by Powers, we think it unnecessary to examine it, for the garnishee will scarcely insist on introducing them on another trial, nor is it probable that the plaintiff would object to them if offered, as they might tend to prove a promise on the part of the garnishee to pay the debt to Powers.

Judgment reversed, and the cause remanded.

NOTE.—On a re-hearing of this cause, the following opinion was delivered:

Per curiam. We have fully examined the cases to which we have been referred by the counsel for the defendant in error, and feel satisfied that the opinion heretofore rendered in this case asserts the law correctly. And our subsequent examination and reflection have the more confirmed us in the views then expressed, that the process of garnishment, being a legal proceeding, only entitles the plaintiff in the garnishment to a condemnation of such indebtedness on the part of the garnishee to the defendant in the attachment, as could be recovered by debt or *indebitatus assumpsit* in the name of the latter. Such seem to have been the views of our predecessors in Walke v. McGehee, 11 Ala. 273, and which is substantially followed in McGehee v. Walke, 15 Ala. 183.

The case of Peck & Clarke v. Lewis & Wallace at the present term shows, that the legal presumption arising upon the face of the note, notwithstanding it was shown to have been in possession of Powers, the defendant in the attachment, was that it evidenced a debt due to Meek, the payee, and not to Powers. It was then *prima facie* irrelevant, and the court should have excluded it, unless offered in connection with other proof, showing its relevancy, or at least with a proposal to make such additional proof. The bill of exceptions showing that it was *prima facie* irrelevant and inadmissible, if there was any reason shown why it should have been admitted, the party at whose instance the proof was received should have set it out; for where the court is put in error by the bill of exceptions, it is the duty of the court to set itself right, if the facts justify it, and if this be not done, we can indulge no presumption that facts were shown which would have cured the error.—Smith v. Maxwell, 1 S. & P. 221; Davis v. The State, 17 Ala. 415.

WILLIS & CO. *vs.* THE PLANTERS' & MERCHANTS' BANK OF MOBILE.

1. In a trial of the right of property to certain slaves, which had been levied on under execution, and to which a claim had been interposed, if the jury assess the aggregate value of the slaves, instead of the separate value of each, that portion of their verdict is without legal warrant and wholly nugatory, and must be treated as surplusage. But the judgment will not be reversed on account of such defect, if the verdict is in other respects formal, and sufficient to authorize the judgment rendered upon it.
2. An order setting aside a judgment and granting a new trial, "upon the payment of all costs," does not vacate the judgment; and if the costs are not paid, a subsequent judgment, "that the order is therefore discharged and the plaintiff permitted to proceed upon the previous judgment as if no such order had been made," merely gives the previous judgment its full effect.

ERROR to the Circuit Court of Lowndes. Tried before the Hon. Nathan Cook.

THIS was a trial of the right of property in certain slaves which had been levied on under an execution in favor of the P. & M. Bank of Mobile, and claimed by the plaintiffs in error. The jury found a verdict in favor of the Bank, and assessed the *aggregate value* of the slaves. The plaintiff in error made a motion to set aside the judgment and for a new trial, upon which an order was made, "that said motion be granted upon the payment of all costs which have accrued in said cause from the commencement up to this day." A subsequent judgment was rendered which recites that the claimants had not complied with the order made at the last term of the court, and that said motion is therefore discharged, and said plaintiff permitted to proceed upon the judgment obtained at the last term of the court, as if no such order had been made.

STONE & JUDGE, for the plaintiff in error:

1. The value of each slave should have been separately assessed by the jury. The statute makes it the imperative duty of the jury to do it.—Clay's Dig. 213, § 64. The action of detinue in this respect is analogous; and in detinue it is an indispensable requisite.—Bell v. Pharr et al., 7 Ala. 807; Haynes

v. Crutchfield, ib. 189. 'Tis true this court has decided, that the omission of the jury to discharge this duty is not an error of which the claimant can complain.—Hardy et al. v. Gascoignes, 6 Port. 447; Phelan v. Fancher, 5 Ala. 449. And it has also decided that it is not an error of which the plaintiff in execution can complain.—Burnet, Wilroy & Co. v. Maxey, 9 Port. 410. If these decisions are adhered to, it is respectfully submitted, that an imperative statute of the State will have been repealed by this court. The reason given why the claimant cannot complain of such an omission is, that he is thereby placed in a better position. This reason is unsound. If no value is assessed, the claimant is placed in a worse condition; for if the property dies or is destroyed before the trial, no value being assessed, a suit at common law, and recovery upon the claim bond, would be a matter of course; and thus it would take two suits to determine what the statute intended should be cheaply and expeditiously determined by one.—See Garnett, adm'r, v. Roper, 10 Ala. 842.

2. But upon this point, this case is unlike any other which has ever yet been before this court. The jury did assess the value, but the aggregate value of all the slaves, instead of the value of each separately. The jury having undertaken to assess the value, should have done it correctly. A portion of the slaves may be dead, so that all cannot be delivered up; and if all are not delivered, the bond will be forfeited; and if the bond is forfeited, execution must issue "for the value of the property as assessed by the jury."—Dig. 213, § 64. Claimant then must deliver all or none, when the statute secures to him the right to deliver all, "or any part thereof." Thus, the court will perceive, that if the assessment of no value would not be an injury, yet the erroneous assessment of value made is an injury.

3. The error last assigned is fatal to the cause and must reverse it. The payment of the costs was not made a condition precedent to the granting of the new trial. The words, "upon the payment of the costs," had no other effect than to impose upon the claimants an obligation to pay the costs, which might have been enforced by attachment, or the issuance of an execution."—Dana v. Gill, 5 J. J. Mar. 242; Johnson v. Taylor, 3 S. & M. 92; Supplement U. S. Dig. vol. 2, p. 432, § 67. The new trial having been awarded at one term, the court at a subsequent term had no power to set aside the order granting it.

On the error last assigned, the cases of Dana v. Gill, 5 J. J. Mar. 242, and Johnson v. Taylor, 3 S. & M., are in point and decisive.

SAFFOLD, *contra:*

1. As to the assignment, that the separate value of each piece of property, or each slave, should have been assessed by the jury, the Supreme Court have already decided that point.—Hardy et als. v. Gascoignes & Holly, 6 Port. 447; Burnet et als. v. Maxey, 9 Port. 410; Lee v. Bryan, 3 Ala. 278. The separate value of each slave was proper for the benefit of plaintiff in execution, but it was for the benefit of defendant that no separate value should be assessed. The truth was, the plaintiffs did not care to have the separate value assessed, as the judgment for cost and the 10 per cent. damages was all they wanted. The balance had been made out of other persons, parties to the execution.

2. As to the assignment of error, that the cause should have been tried *de novo*, without the condition on which a new trial was granted being complied with, such a construction of the order would have amounted to a permission for a new trial without any terms at all. The claimants were non-residents. They had already at the previous term failed to pay up the cost within four months, imposed as a condition precedent to their litigating the claim, which was all-important if their claim was *bona fide*. They fail to pay the cost, and a judgment goes against them at the next term, and a new trial is ordered on condition that they pay up all the cost. They take till the next term to pay the cost, the term arrives, the cost is not paid, and the court makes another order permitting plaintiffs in execution to proceed on their judgment. What other course could have been pursued to give effect to the orders of the court? The cost should have been paid *instanter*. The Circuit Court certainly had a right to construe its own previous order and to determine what it meant by it.—See Stephenson et al. v. Mansony, 4 Ala. 317. There the order was, "the plaintiff is hereby required to remit the one thousand dollars damages assessed by the jury, or a new trial is granted by the court on the payment of all cost." The cost was paid in a month after the order was made, and the new trial was the consequence.—See also, Reese v. Billing, 9 Ala. 265. So

in the case now before the court, the order granting a new trial on the payment of all the cost operated as a continuance of the case just as it was when the order was made, until the court should decide by a definitive order the situation of the case; especially if the cost was not paid. At the next term of the court, the cost not having been paid, the court made the definitive order that the plaintiffs were permitted to proceed. The previous order was vacated. This action of the court was also its own interpretation of the previous order, and that was, that claimant should pay the cost without execution. The idea that an execution should have been issued, cannot be sustained. There was no judgment for cost alone; the order had not the effect of an execution. Even if an execution could have been issued, plaintiffs were not bound to rely upon that. It would not reach them in Virginia, and they might also be insolvent. The court intended to place the plaintiffs on safe ground as to the cost. The order cannot be construed to mean anything but the payment of cost as a condition precedent.—4 Ch. Gen. Pr. 88—see Edwards & Lewis, decided June Term, 1850. At least, it can bear that construction, and the presumption of the Supreme Court will be in favor of the judgment below.

3. This order of the court discharging a former order, is not a subject for revision in this court. It was no judgment of the court, but merely a discretionary order which it had a right to set aside, if the claimants did not comply with the conditions.—See Stephenson v. Mansony, 4 Ala. 317.

CHILTON, J.—The first objection insisted on is, that the jury found the aggregate value of the slaves, instead of the separate value of each slave, as the statute requires. It is well settled, that if they had assessed *no value*, this would not have constituted an error of which the claimants could have availed themselves.—Hardy et al. v. Gascoignes & Holly, 6 Port. 447; Burnett, Wilroy & Co. v. Maxey, 9 ib. 410. That the jury have assessed the value in a manner not recognized by the statute, cannot place the plaintiff in execution in a worse condition than if they had assessed no value, and the most that can be said of this portion of their verdict is, that it was without any legal warrant, and wholly nugatory, and would not justify the court in basing any subsequent proceeding upon that portion of

it which must be treated as surplusage. In other respects it is quite formal, and fully authorizes the judgment which was rendered.—See Lee v. Bryan, 3 Ala. 278.

2. The only remaining question is, must we regard the order setting aside the judgment and granting a new trial "upon the payment of all the cost which had accrued in said cause" from the commencement up to the day the order was made, as vacating the judgment absolutely or conditionally.

The cases cited by the counsel for the plaintiff in error certainly sustain his view, that the language here employed, "upon the payment of the cost," has no other effect than to impose on the claimants an obligation to pay the cost, which might have been enforced by attachment or execution. But we think that the previous decisions of this court would not justify us in placing this construction upon the language, nor do we regard it a correct exposition of the language of the order. The granting of a new trial *upon* the payment of all cost, is manifestly to make the grant conditional, or dependent upon the payment.

In Stephenson et al. v. Mansony, 4 Ala. 317, it was held that the court trying the cause may annex, as a condition on which a new trial is granted, that the party asking for it pay costs, or that it be granted unless the plaintiff remit damages. The court in that case ordered upon a motion for a new trial, that "the plaintiff is hereby required to remit the $1,000 damages assessed by the jury, or a new trial is granted by the court on the payment of all cost." The cost having been paid in vacation, a short time after the adjournment of the court, at the second term thereafter the plaintiff moved to release the damages and to strike the cause from the docket, but the court held that the cost was paid in due time, and the failure to enter the release by the plaintiff had the effect when coupled with such payment by the defendant, to re-instate the cause. So in Reese v. Billing, 9 Ala. 265, an order was granted setting aside a nonsuit, "if the plaintiff pay the cost by the next term," &c. This court said, that by setting aside the nonsuit on the terms indicated, the cause was necessarily continued until the succeeding court should declare by a definitive order, whether the costs were paid, and the condition of the cause. As to the right to continue such motions, see Walker v. Hale, 16 Ala. 26.

The effect of the subsequent judgment was merely to deter-

mine that the condition upon which the new trial was awarded had not been complied with, and to disallow the motion, thereby giving to the judgment previously rendered its full effect. In our opinion, the court committed no error for which the plaintiff in error can complain, and the judgment is consequently affirmed.

STRONG *et al. vs.* GREGORY.

1. In the construction of written instruments, the intention of the parties must govern, and to ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view.
2. An ante-nuptial contract was entered into between a woman and her intended husband, by which it was agreed, that after the marriage had been solemnized, a certain portion of the slaves and other property, which the wife had in possession and in remainder, should be settled and secured by some good and sufficient conveyance, upon a trustee for the use and behoof of the wife during the term of her natural life, with a provision in the settlement, that the property thus conveyed might be changed, sold and resold, or the whole trust annulled, whenever the husband and wife should jointly agree to do so. It was also thereby agreed, that the residue of the slaves which the wife had should be conveyed to the trustee for the use of the wife, until the husband should direct them to be sold, and when sold, the proceeds to be paid to the husband. *Held*, 1st, that it was the manifest intention of the parties, that the wife should take a *separate* estate in that portion of the property which was to be conveyed to the trustee "for her use and benefit during the term of her natural life."
2. That the power given to the husband and wife, to annul the trust by their consent, does not subject the property to his debts.
3. That the husband, during his wife's life, does not take such an interest in the remainder, after the determination of her life estate, as is subject to levy and sale at law.

Error to the Chancery Court of Butler. Tried before the Hon. J. W. Lesesne.

The bill shows that complainant, Susan Gregory, before her intermarriage, was possessed of ninety-two slaves in the State of Georgia, and also of a quantity of stock, farming utensils, &c; also, to the remainder in several tracts of land, and other slaves in which Mary Ingram had an estate for life. That intending to intermarry with Ossian Gregory, her husband, they entered into an agreement in writing, which described the slaves and other property, and recited that the marriage was shortly to be solemnized, and by which they covenanted and agreed in case the marriage should take place, by some good and sufficient conveyance to settle and secure sixty-one of the slaves, of which the complainant was then possessed, and also the stock and provisions on hand, together with the property to which she was entitled in remainder, on one James A. Nesbit, to the use and behoof of the complainant during the term of her natural life. Said settlement, however, to contain a provision, that the property might be changed, sold and re-sold, or the whole trust annulled, whenever the said Ossian and the said complainant should jointly agree to do so, and as to the other slaves, of which the complainant was possessed, it was agreed that the said Ossian and Susan, his intended wife, would likewise settle and secure them to the said Nesbit for the use of the said complainant, until the said Ossian should direct them to be sold, and when sold, the proceeds were to be paid over to the said Ossian. It is further shown by the bill, that the said Ossian at the time of the marriage was insolvent and largely indebted, and that the object of the agreement was to give to the complainant a separate estate in all the property, except the slaves which were to be sold by the order of Ossian Gregory.

The bill further alleges that the marriage was consummated, and the slaves sold, which were liable to be sold under the order of Ossian Gregory; and with the consent of Nesbit, the complainant and her husband removed to Alabama, and brought the sixty-one slaves with them, which were to be conveyed to Nesbit, for the use and behoof of complainant. It is further shown, that the creditors of Ossian Gregory sued him in Alabama, and obtained judgments, some of whom have levied executions on the slaves, and others are threatening to do it, and that the trustee had interposed his claim to the property levied on. The bill also states, that by mistake of the attorney, Mr.

Poe, who was employed to draw up the agreement, he omitted to use such words as would show clearly, that it was the intention of the parties to settle the property on the complainant for her sole and separate use, and prays a reformation of the agreement in this respect. An injunction is also prayed against the creditors of Ossian Gregory, who are made parties to the bill, and for general relief.

The several answers of the creditors deny that there was any mistake in drawing up the agreement, and insist that the property is liable to the satisfaction of their debts.

WATTS & ELMORE, for the plaintiff.

WILLIAMS, *contra:*

DARGAN, C. J.—In the construction of instruments perfect and complete within themselves, and which require no further act to be done to define and ascertain the rights of the parties, before we can exclude the marital rights of the husband, it must plainly and distinctly appear, that such was the intention of the grantor.—Lamb. v. Wragg & Stewart, 8 Por.; Dunn and Wife v. The Bank of Mobile, 2 Ala. 152; Oneal v. Teague, 8 Ala. 345; Pollard v. Merrill & Exemir, 15 Ala. 169. The mere vesting of the legal title in a trustee for the use of a woman, whether sole or married, will not ordinarily have the effect of giving her a separate estate in the trust, free from the marital rights of her husband. Thus in the case of Lamb v. Wragg & Stewart, *supra*, a father conveyed slaves to his son-in-law, in trust for his wife, (*the daughter of the grantor*,) and the question was, whether the wife took a separate estate in the slaves. This court held that she did not. In the case of Lamb v. Milnes, 5 Vesey, jr., 521, the master of the rolls held that the marital rights of the husband were not excluded by vesting the legal title in a trustee, for the benefit of the wife.—See also, Kensington v. Dallard, 7 Con. Eng. Ch. 322. But as it is the intention of the parties executing the instrument that must govern in determining whether a separate estate is executed in favor of the wife, we must look to the nature of the instrument, and the condition of the parties executing it, in arriving at that intention; for no particular form of words is indispensably requisite to create a separate estate in favor of a married woman,—

(Bright on Husband and Wife, vol. 2, 211; Stanton v. Hall, 6 Con. Eng. Ch. 445;) and it is said that in construing instruments that are executory in their character, and which require some further act to be done to define and settle the rights of the parties, a court of equity will indulge in a wider range of interpretation for the purpose of arriving at the intention.—2 Story's Equity, vol. 2, § 983. Yet it must be admitted, that it is the intention that must govern in determining whether a separate estate is given to a married woman or not, whether the agreement be complete or executory. But it does not follow that the same words are to receive the same construction in every instrument, or rather, the same intention is not always evinced in every instrument by the use of the same words. But we must look to the condition of the parties, the objects they had in view, and to the entire instrument itself, to arrive at a just and proper conclusion as to their intentions, and when we are entirely convinced from these sources what were the intentions of the parties, we must give effect to such intentions, notwithstanding the same words might be differently construed in other instruments. Thus it may be admitted, that if property be conveyed to a trustee for the use of a married woman, the marital rights of the husband will not be excluded, because it does not appear that such was the intention of the grantor. But in the case before us, all the property at the time of executing the agreement belonged to the complainant, who was then a single woman. She and her intended husband before the marriage stipulated, that after the marriage should have been solemnized, they would, by some good and sufficient conveyance, settle a part of the property on a trustee, for the use and behoof of the complainant, and another portion on the same trustee, for the benefit of the intended husband. Now I ask, who can doubt that it was the intention of the parties, that the intended wife should take an interest in that portion of the property to be settled on the trustee for her use? If such were not their intentions, and they intended the husband to take the whole, why settle one part on the trustee for the use of the intended husband, and another part for the use of the wife? It is too plain I think, to admit of doubt, that it was the intention, that the wife should take an interest, and we can only carry into effect this intention by giving her a separate estate. The language of the agreement is, that it (the property) should

be settled on the trustee "*to the use and behoof of the complainant*," and this settlement was to be executed by the husband and wife after their intermarriage. How can it be settled to her use and behoof, unless we give her a separate estate? This we must do, or we will allow her no interest or rights in the property whatever; and thus, the manifest intention of the parties will be frustrated. To be for her use, it must be for her *separate* use. The parties have agreed before their marriage, to settle a portion of the wife's property on a trustee after they should be married, for the use of the wife; this can only be done by giving her a separate estate in the property, and this we must do, or we should hold the agreement to be nugatory, and by construction destroy it, instead of carrying into effect.

This view renders it unnecessary to examine whether or not there was a mistake or an omission in drawing up the agreement; for as it stands, we are bound to hold, that it gives her a separate estate in that portion of the property, which she and her intended husband agreed should be settled on James A. Nesbit for her use and behoof.

2. But it is contended that the power given to the husband and wife by their joint consent to annul the trust, vests the entire property in the husband. To this argument we cannot assent. It is true, that if the husband had the power of disposition of the whole for his own benefit, such a power might subject the property to sale in satisfaction of his debts, as being inconsistent with a separate estate in favor of the wife. But without her consent no part of it can be sold, nor the trusts annulled; and until that consent is given, her rights remain unimpaired, and neither the husband nor his creditors can take them from her.

3. It is also insisted, that the wife takes but a life estate in the property in any event, and the remainder belongs *to her husband*, which is the subject of levy and sale at law. We do not deem it necessary to decide whether the husband is entitled to the remainder after the death of the wife, in opposition to the issue of the marriage; for it is clear, that to carry out the intentions of the parties to the agreement, the legal title to the whole property must be vested in a trustee. And even if the husband would be entitled to any interest after the death of his wife, it can at this time be but an equitable and not a legal interest, and therefore not the subject of a levy and sale at law.

The trust in this case is not executed, but is still executory, and must so continue for the purpose of protecting the interest of the wife during her life, at least. The legal title to the property is held for her benefit, and the husband can have only an equitable interest in the remainder so long as the trust is executory, for until executed the legal title must be in a trustee. Without, therefore, deciding what interest, if any, the husband may have in the remainder, it is clear that he has none at this time which is the subject of levy and sale at law.

We can perceive no error in the decree, and it must be affirmed.

BOXLEY *vs.* GAYLE.

1. The defendant, under the plea of set-off, introduced an account in his own handwriting against the plaintiff, on the back of which the plaintiff had written, that he never could admit such an account as the within, and that until the proof accompanied it he would not attempt a settlement with the defendant or any one else. He also proved the plaintiff's admissions that there were unsettled matters of account between them. *Held*—
   1. That the account and endorsement thereon were inadmissible without further proof.
   2. That a charge "that if the plaintiff only denied the defendant's accounts so far as to call for proof of the amounts, it was only such a denial as would put the defendant on the proof of them, and was sufficient to take them out of the statute of limitations," was abstract, and therefore properly refused.
2. A general admission of unsettled matters of account is not sufficient to take any particular account out of the statute of limitation, unless it is shown that the admission was made in reference to it.

Error to the Circuit Court of Dallas. Tried before the Hon. Nathan Cook.

Bird, for plaintiff in error.

Lapsley & Hunter, *contra*.

PARSONS, J.—The bill of exceptions shows that Boxley, who was the defendant below, relied upon a cross demand in the shape of an account, but the bill of exceptions is silent as to the nature of the account, the items and amount.

But on the trial he produced an account in his own handwriting containing divers charges against the plaintiff below, and proved by a witness that he, the witness, once, within three years before the commencement of this suit, saw the same account in the hand of the plaintiff below, who spoke of and denied several particular items, and also, in general terms, denied the whole account, and said he would not pay it. At the same time the witness saw an endorsement on the account, in the handwriting of the plaintiff below, in the words following: "I never could admit such an account as the within, and until the proof accompany it, I will not attempt a settlement with Mr. Boxley or any one else," which was signed by the plaintiff below.

The defendant below, upon this proof, offered the account and the endorsement in evidence, to show, first, that it had been presented at a certain date; secondly, that there were unsettled accounts between the parties; thirdly, as an admission of an unsettled existing liability, so far as to enable defendant below to introduce proof in relation to the same; and also for the purpose of getting said "memorandum" before the jury; but the plaintiff objected to this evidence, and his objection was sustained.

This court has often, and in a variety of cases, held that it will not reverse, in consequence of any matter or thing stated in a bill of exceptions, unless it is made to appear that there was error to the injury of the party excepting. Error, or any fact to constitute error, will not be presumed. The account was in the handwriting of the defendant below—it was no evidence for him. But if the plaintiff below had made admissions in reference to it, then it would have been admissible to explain and apply the admissions. But so far from this, he denied it verbally and in writing. The utmost that can be inferred from the endorsement is, that if the defendant below would present the proof of his account, the plaintiff would go into a settlement; but the defendant neither proved nor offered to prove that he had done so. If it conduced in some very small degree to prove that there were unsettled accounts between the parties, and an existing liability, yet, as proof of the particular account set up as a cross

demand, it was too remote and uncertain, especially as it does not appear that any particular proof of that account was offered. And if the party had other proof to connect with and make it admissible, he should have offered it, or, at least, stated to the court particularly what it was. This court held, in Watson v. Byers, 1 Ala. 393, that an admission by the defendant, upon the presentation of an account to him, that part of the account was correct, but without stating what part, and neither admitting nor denying the residue, could not be construed into an admission that the entire account was just, and was of no value for the part admitted, from its uncertainty. In the present case, nothing was admitted, but all was denied by necessary implication. Therefore, there was no injury in rejecting the memorandum, or in rejecting the evidence that the account was presented at a particular time, as it was denied.

2. There was other evidence that the plaintiff below had admitted within three years, that there were unsettled matters of account between the parties, but it does not appear that he stated what they were or the amount, nor on which side the balance was. The defendant below asked the court to charge, that if the plaintiff denied his accounts so far only as to call for proof of the amounts, it was only such a denial as would put the defendant on the proof of his claims, but was sufficient to take them out of the statute of limitations. This the court refused, because, as stated by the court, there was no evidence tending to show any such a state of facts. The court did not mean to say, it is very evident, that there was no evidence of the plaintiff's admission of the fact of unsettled accounts. But it did not appear that the plaintiff had denied the accounts offered, so far only as to call for proof, and that he would thereupon pay them, or make no further objection. Neither was there any evidence, as we infer from the bill of exceptions, that the defendant below gave any evidence of his accounts on the trial. Such a charge would have been abstract, and the court was not bound to give it.

3. The court, at the request of the plaintiff below, charged the jury, that the proof of his admission of the unsettled accounts, was no such admission of the defendant's accounts, claimed as a set-off in this suit, as would take them out of the statute of limitations, unless the proof had a tendency to show that the admission was made in reference to the defendant's *said* accounts. To

this charge the defendant excepted, but we are unable to see any error in it. We have decided the case as if the bill of exceptions had properly stated the exception on each of the points, as it certainly does with regard to the last one; because, conceding that for the sake of argument, still no error is shown.

Let the judgment be affirmed.

HENDERSON *vs.* HALE.

1. When there are several counts in the declaration, and a plea is pleaded to only a portion of them, a demurrer to such a plea may be visited upon the counts to which it relates.
2. A publication made by the defendant, of and concerning the plaintiff, which alleges substantially, that the town commissioners had placed in the hands of the plaintiff, as County Treasurer, notes to the amount of $1949 94; that the defendant notified him that the commissioners appointed by the Judge of the County Court to examine his office were in town, and willing to proceed with the investigation, but the plaintiff said he had not time for the investigation before the election, and refused; that the plaintiff and his friends had circulated the report, that he made the proposal to go into the examination, and that the defendant refused; that the commissioners made a slight examination of the plaintiff's papers, and found among them receipts of C, for $626 04; that the plaintiff accounted for the receipt of $276 55, and had vouchers for cash paid out $219 85, and cash on hand $35; that the defendant "warned" him to have his books and office examined, instead of the few papers which he had exhibited, but he refused; that the plaintiff only reported to the commissioners $276 55, as collected by him, as appeared from their certificate; and which then avers "that there has been $510 45 collected from the claims placed in his hands by said commissioners," and annexes the names of the persons from whom collected, is not a libel, and its meaning cannot be enlarged by an innuendo, that the defendant thereby intended to charge the plaintiff with fraud, corruption, embezzlement, or other misconduct in his office of County Treasurer.

Error to the Circuit Court of Cherokee. Tried before the Hon. S. C. Posey.

Rice & Morgan, for plaintiff in error:

1. Libel has always been treated with sterner vigor than slander; "because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words."—White v. Nicholls, 3 Howard's (U. S.) Rep. 285.—Weir v. Hoss and Wife, 6 Ala. 881.

2. Actions may be maintained for defamatory words published in writing or in print, which would not have been actionable if spoken.—3 Howard's U. S. Rep. 285; Levi v. Milne, 13 Eng. Com. Law, 396; 6 Ala. 881.

3. Words not otherwise actionable, may form the basis of an action when spoken of a party in respect of his office, profession or business."—3 Howard (U. S. Rep. 285.—Levi v. Milne, 13 Eng. Com. Law. Rep. 396.

4. The law presumes a libellous publication to be malicious, unless it is proved to be published on an innocent or justifiable occasion, ib.—Dexter v. Spear, 4 Mason, 115.

5. For the oath and duties of a County Treasurer—see Clay's Dig. 577-580. For additional duties and responsibilties of County Treasurer of Cherokee county—see Pamphlet Acts of 1843-4, p. 160-164, § 5 & 8, &c., all the sections.

6. When the declaration contains any good count, and pleas are filed to which the plaintiff demurs, it is erroneous for the court to visit such demurrer back upon the declaration. And if upon such erroneous decision, the plaintiff is induced to take a non-suit, he may, under our statute, avail himself of such error in this court and have the judgment reversed. The interference of the court below, in such an irregular manner, with the established modes of proceeding, cannot be sanctioned.—Fontaine v. Lee, 6 Ala. 889.—(See the statute which authorizes a party to take a non-suit, and still revise the proceedings.)

7. The intent with which words were published, or the sense in which they were used, is a question of fact: The intent or sense is averred; and frequently words become libellous from the intent or sense.

White & J. B. Martin, *contra:*

There is nothing in the libel complained of in itself, which sub

jects the plaintiff to ridicule, disgrace or infamy. It is not alleged that these claims were placed in his hands as county treasurer, or that he was bound to account for them. Nor it is alleged that Brindler and others are commissioners appointed under the law, to examine his office as county treasurer. Nor is it stated what commissioners they are.

The judge of the County Court, and the commissioners of roads and revenues have the power to examine the office of the county treasurer, and it is the duty of the judge of the County Court, to appoint once in each year, three persons to examine the books and vouchers of the county treasnrer.—Clay's Dig. 580, § 25-28.

Now if either of these had demanded of plaintiff an exhibition of the condition of his office, and he had made a false exhibit to them, this would have been misconduct in office; but to a mere volunteer, he was bound to make no disclosures, and charging him with a failure to disclose, is no imputation. If these are essential facts, they must be averred, or else they cannot be proven, and the declaration is demurrable.

The declaration should have stated that these claims or notes were the property of another, and in his (plaintiff's) custody, either for safe keeping or for collection; unless they were anothers's, he could not be charged with blame for converting them, and unless it was his duty to collect them, he could not be censured.

But the defendant does not charge plaintiff with having collected these notes, or with having failed to collect them. The libel complained of scrupulously avoids such a charge. It states, in connection with the fact, that of the notes placed in Henderson's hands —— were in hands of Wm. L. Cain, as shown by his receipts, that $570 had been collected; it does not say by whom, whether by Henderson or Cain, or some other person, nor can the meaning of this be extended by an innuendo.—Weir v. Hoss, 6 Ala. 881; 1 Chit. Plead. 407; 1 Saun. 243, note 4; McLacy v. Ross, 5 Bin. 218; Stafford v. Green, 1 Johnson, 505.

When libel is actionable only in respect of the plaintiff's profession, there must be a distinct allegation, that plaintiff was at the time of the scandal, in such profession.—1 Chit. Plead. 402, and a mere statement in the inducement is not sufficient.

Words not actionable in themselves, cannot be rendered so by an innuendo, without a prefatory averment of extrinsicf acts which

make them slanderous.—Watts v. Greenleaf, 2 Dev. 115; Linville v. Earlyvine, 4 Black. 470; Brown v. Brown, 14 Maine Rep. 317; Sweetapple v. Jesse, 5 Barn & Ad. 24-27.—Wood v. Scott, 13. Ves. 42; Canterbury v. Hill, 4 S. & P. 224; Baugh v. Harm, 8 Johns. 109; 8 Miss. 512. The declaration should show how the libel connects itself with the professional conduct of plaintiff, Ayre v. Craven, 2 Ad. & Ellis, 2. The greatest strictness of pleading required in this action, State v. Brownlow, 7 Meigs, 63.

The declaration cannot be sustained on the ground that the publication was made in reference to one in office, or in reference to his conduct in office. The declaration to sustain such action should have charged an actual breach of official duty, or of oath, or the commission of some crime or misdemeanor.—Hogg v. Dorrah, 2 Por. 212; Booker v. Coffin, 5th Johns. 188. Onslow v. Horne, 3 Wilson, 177.

In a matter of public concern, a majority of commissioners may act.—Jennings & Graham v. Adm'rs. of Jenkin, 9 Ala. 285; Com'rs. of Allegany Co. v. Licking, 6 S. & R. 166; Baltimore Turnp., 5 Binn. 481; but there is no case in which a minority can act.

The county treasurer was not bound to account to the commissioners of the town of Centre.—Acts of 1843-4, 162, §§ 5, 8.

A demurrer in any stage of the pleadings reaches to the first defect.—Governor v. Baker and others, 14 Ala. 655; Haynes v. Covington, 9 S. & M. 470.

CHILTON, J.—This was an action on the case brought by the plaintiff in error, against the defendant in the Circuit Court of Cherokee.

The declaration contained seven counts. The defendant demurred to the fourth count, which demurrer was sustained, and he pleaded to the first, second, third and fifth, not guilty, and justification. To these pleas the plaintiff demurred, and the defendant asked that the demurrer should be visited upon the counts to which the pleas related, and the court considering said counts insufficient visited the demurrer upon them, and held them bad; thereupon, the plaintiff entered a *nolle prosequi* as to the other counts, and judgment was entered upon the demurrer for the defendant.

It is unnecessary for us to decide, whether the demurrer to a plea, can be visited upon any count in the declaration, to which the plea did not purport to be an answer. This is not the point bebefore us. The question here is, whether, where there are several counts, and the plea is pleaded to only a portion of them, a demurrer to such plea may be visited upon the counts to which the plea relates; and this question is too clear and well settled to admit of any doubt. A demurrer to the plea opens the previous pleadings, and reaches back to the first fault of the party demurring upon the motion of the opposite party, and we see no reason why this rule should not apply in cases where there are several counts. A demurrer to the plea goes back to the count; so a demurrer to a replication goes back to the plea, and this, although a demurrer has been overruled previously to the plea.—Cummings v. Gray, 4 Stew. & Por. 397; Donnell v. Jones, 13 Ala. 390; ib. 500; Sykes v. Lewis, 17 Ala. 265. We think if any one of the counts to which these pleas related, was defective and insufficient, it was the duty of the court, upon the motion of the defendant, to visit the plaintiff's demurrer upon them.

The question then comes up, were any of the counts to which a demurrer was sustained sufficient. Property to determine this question, it will be necessary to ascertain particularly the legal effect of the averments contained in them.

The first count alleges that the plaintiff for a long time before, and at the time of filing the declaration, was the treasurer of Cherokee county, and after stating his good character, &c., by way of inducement, avers that the defendant wickedly intending to bring him into disgrace, &c., as county treasurer, &c., falsely, wickedly and maliciously composed and published of and concerning the said plaintiff, and of and concerning his demeanor in his office of county treasurer as aforesaid, the false, scandalous, malicious and defamatory libel following; that is to say:

"To the public: R. S. T. Henderson, Esq., and others in his interest, are circulating a report that he (Henderson) as county treasurer, proposed on last week to have his office examined by the gentlemen appointed by the judge of the County Court for that purpose, and that I objected, and said it should not be done until after the election. The following certificate shows which were for, and which were opposed to the examination.

Certificate, No. 1.—We the undersigned, do certify, that we

were present in Centre, when the following certificate of the town commissioners were made, and that Martin Hale informed Mr. Henderson that the committee appointed by the judge of the County Court were in town, and willing to examine his books as treasurer. Henderson refused to have it done, and said he had no time until after the election," signed by S. P. Wharton and Wm. Hickman.

"On the day the commissioners gave Henderson the certificate, he has produced and circulated, I warned Henderson to have his books and office examined by the proper persons, instead of a few papers he showed to the said commissioners. He refused, and said commissioners gave the following certificate.

"Certificate, No. 2.—We the undersigned do certify, that we paid in the county treasury of Cherokee county, notes of the sale of the town of Centre, to the amount of $1949 94 1-4, and after taking a slight look over Henderson's, said county treasurer's, papers, find there receipts of William L. Cain amounting in all to $626 04; only two notes over fifty dollars, which two notes were against Moses Scott and William Hickman, for $119 55 each. Said Henderson accounts for receiving $276 55, and has vouchers for money paid out $219 85, and found cash on hand, $35. Given under my hand, this 21st July, 1847.

(Signed) James Wharton,
Aaron Clifton,
Asa R. Brinley.

"From the foregoing certificate, Henderson only reported $276 55, as collected by him. I say there has been $510 45 collected from the claims placed in his hands by said commissioners, and annex the names of persons of whom collected. I know not how many more have paid, or where the notes are." Signed Martin Hale; and then follows a list of names with the amounts paid by them, making in the aggregate $510 45.

The said defendant meaning, and intending by said false, scandalous and defamatory libel, to charge the said plaintiff with fraud, corruption and misconduct in his said office of county treasurer of Cherokee county.

The second count only avers the last paragraph of the publication as libellous, with the innuendo; "meaning thereby to charge the plaintiff with the crime of embezzlement."

The third and fifth counts are not essentially variant from

these above mentioned; the innuendo to the third, that the defendant thereby intended "to charge the plaintiff with being guilty of a fraudulent concealment of the condition of the business of his said office of county treasurer, and to charge him with gross misconduct in said office." The innuendo to the fifth count is, that the defendant meant to charge the plaintiff with the crime of embezzlement.

It is the office of an innuendo to explain some matter already expressed, or serve to point out where there is precedent matter. It may apply what is already expressed, but cannot add to, enlarge or change the sense of the previous words. If it introduce a meaning broader than that which the words naturally bear, it is bad, unless connected with proper introductory averments.—See this doctrine fully exemplified in notes to 1 Saund. R. 243; also, Golstein v. Foss, 6 B. & C. 154, (S. C. 13 Eng. C. L. R. 128); S. C. on Error in Exch. Cham., 4 Bing. 489, (15 Eng. C. L. R. 53.) And it is for the court to determine whether the meaning charged by the innuendo *may legally* be attributed to the publication, and for the jury to decide whether the intent charged be true in fact.

Now, waiving the consideration of the objection that this declaration does not charge the plaintiff to have been *at the time* of the publication of the alleged libel, the treasurer, we do not think that a fair and reasonable interpretation of it can be considered as imputing to the plaintiff the crime of embezzlement, or of any corruption or malfeasance in the discharge of his official duties. The substance of the publication is, that the commissioners for the town of Centre had deposited or paid over to Henderson, as county treasurer of Cherokee county, notes to the amount of $1949 94¼; that Hale notified Henderson that the commissioners appointed by the Judge of the County Court to examine his office were in town and willing to proceed with the investigation, but the latter said he had not time for the investigation before the election, and refused; that Henderson and his friends had circulated the report that he, Henderson, made the proposal to go into the examination, and that Hale refused; that the commissioners made a slight examination of Henderson's papers and found among them receipts of W. L. Cain, amounting to $626 04; that Henderson accounted for the receipt of $276 55, and had vouchers for cash paid out, $219 85, and cash on hand, $35;

that Hale warned Henderson to have his books and office examined, instead of a few papers which he exhibited, but he refused; that Henderson only reported to the commissioners $276 55 as collected by him, as appears from their certificate. The defendant then avers, that there has been $510 45 collected from the claims placed in said Henderson's hands, and annexes the names of the persons from whom collected. Now what is there in all this, imputing gross negligence, dishonesty, or other impropriety in the discharge of Henderson's official duties? The defendant does not state that *Henderson* has collected more money than he has accounted for; he only says there was more collected from the notes placed in his hands, but the publication shows that a portion of these notes were placed in the hands of a third person, whose receipts they found on file, who may have received the amounts collected; and we are led to infer this from the guarded manner in which it is stated in the publicatiom: "From the foregoing certificate, Henderson only reported $276 55 *as collected by him.* I say there has been $510 45 collected"—(he does not say by him, but)—"*from the claims placed in his hands by said commissioners,*" *&c.* This writing must receive the interpretation which an ordinary reader would put upon it, (Cooke's Law of Defam. 4,) and thus construed, we do not regard it as libellous. A libel affecting the character of individuals is defined to be any writing, picture or other sign tending, without lawful excuse, to injure the character of an individual, by subjecting him to ridicule, contempt or disgrace.—1 Star. on Slan. 169; Cooke on Def. 2; Weir v. Hoss & Wife, 6 Ala. 881. We do not think that such is the tendency of this publication. There is no averment in the declaration that it was the duty of Henderson to have his books and office examined at the time Hale desired him, or in the language of the writing, "warned" him to do so. So that his refusal cannot legitimately be construed into a breach of official duty. There is no averment that it was his duty to have collected the notes placed in his hands by the town commissioners, but if the statute would supply the want of such averment, still he had the right to place them in the hands of an attorney or a justice of the peace for collection by suit. There is no averment that he had converted any of the notes or the proceeds of the same to his own use, or that he concealed anything from the commissioners, or that they demanded an ex-

amination into the affairs of his office, as the statute requires. The most that can be said of the publication, as exhibited in the several counts to which demurrers were sustained, is, that Henderson refused upon, it may be, the officious application of Hale, to have his office and books examined before the election, and that certain persons upon a *slight* examination of some papers exhibited, gave a certificate which does not show what disposition has been made of all the notes placed in Henderson's hands. We have seen that the innuendoes which enlarge the meaning of the writing are not justified. The court properly sustained the demurrers. Let the judgment be affirmed.

STEWART *vs.* KIRKLAND.

1. An assignment of accounts to be created in future vests an equitable interest in the assignee, which will be protected in a court of law, when sued upon in the name of the assignor for the use of the assignee, but not as against a debtor who without notice of the assignment has acquired a legal set-off.
2. When accounts to be created in future are conveyed by deed of trust, together with certain other personal property, the registration of the deed is not *constructive* notice of the assignment of the accounts. To prevent a set-off against them, the defendant must be charged with *actual* notice of their assignment.

ERROR to the Circuit Court of Madison. Tried before the Hon. L. P. Walker.

HUMPHREYS, for plaintiff in error.

ROBINSON, *contra.*

CHILTON, J.—The defendant in error brought his action of assumpsit for the use of Daniel K. Holmes, against Stewart, to recover upon an account for work and labor, &c., amounting to $60 87. Defendant below pleaded off-set and payment. There was a verdict and judgment against him. On the trial a bill of

exceptions was sealed, from which it appears that the plaintiff below read to the jury a deed of trust executed by Kirkland & Holmes on the 30th Dec. 1846, by which the said Kirkland conveys to Holmes as trustee to secure the payment by the first day of Jan. 1848, of certain debts therein named, a few articles of personal property, and the deed then provides that the said Kirkland covenants to carry on his shop during the year 1847, for the benefit of the beneficiaries in said deed, and he conveys all the accounts created by the labor of the said Kirkland during that year, to said Holmes, who is authorized in default of payment of the notes secured, to proceed and collect and appropriate them to the purposes of the trust. This deed was acknowledged and recorded on the 28th Jan. 1847. The account sued on was for work done in the shop during the year 1847. The account which the defendant claimed as an off-set, was for the rent of the shop in which Kirkland had carried on his business for the year 1847, and for articles of clothing and the like, furnished him and his family during the same year, and which, by an understanding between Stewart and Kirkland, were to be paid for by work done in the shop. It appears that the shop in which Kirkland worked in 1847 belonged to Stewart. Upon this state of facts, the counsel for the defendant asked the court to charge the jury—

1. That so far as defendant's account was for necessaries and for shop rent, it was a good set-off.

2. That the probate of said deed was not proof of notice, so far as the conveyance of the maker's labor was concerned. Both these charges were refused, and the court instructed the jury, "that the notice of the deed being good as to one object, was good as to all."

No question is raised by the bill of exceptions as to the validity of the assignment of "all the shop accounts created by the labor of said Kirkland during the year 1847," but the counsel preferred to rest the defence upon the ground that Kirkland had the right to contract debts for articles necessary in the prosecution of his trade, and upon the want of notice. It may well be questioned, whether accounts to be afterwards created by the labor of a party can be the subject matter of such assignment. Be this, however, as it may, it is very clear that the assignment would vest but an equitable interest in the assignee, which the

courts of law would protect when sued upon in the name of the creditor for the use of the person to whom assigned. This protection will, however, never be afforded as against a defendant debtor, who without notice of such assignment has acquired a legal set-off.

In the case before us, the charge of the court, which makes the recording of the deed notice to Stewart, because there were articles of personal property conveyed by it which authorized it to be recorded, cannot be supported. If this deed had passed nothing but the future interest which the grantor might thereafter acquire in accounts, there is no statute requiring its registration.—McCain v. Wood, 4 Ala. 258. The law then would not impose on a person dealing with Kirkland upon the faith of his work being on his own account, the necessity of examining the records of the County Court to ascertain whether he had not assigned in advance of their creation, the accounts against those for whom he did work. To prevent a set-off in such case, the defendant must be charged with actual notice of the assignment, before he acquired the set-off; the registration of the deed is not sufficient, although it was properly recorded as to the personal property conveyed by it. As to the accounts, it was not required to be recorded, and consequently as to them, its registration does not amount to notice, but the party dealing on the faith of them, must have actual notice.—Baker v. Washington, 5 S. P. 142; Tatum v. Young, 1 Por. 298.

As this point must reverse the case, and will probably be decisive of it in the court below, we will express no opinion upon the question, rather indefinitely presented by the first charge asked.

Judgment reversed and cause remanded.

McCLUNG'S EX'RS *vs.* SPOTSWOOD.

1. The question of agency is a matter of fact, which it is the province of the jury to decide upon, and if there is any evidence tending to prove the authority of the agent, it should be left to the jury to determine the sufficiency and weight of that evidence.
2. When authority is given to an agent to do a particular act, and the manner of executing that authority is not prescribed, the principal is bound by the act of the agent, although it may not be done in the manner in which he desired it to be done, or in which he would himself have done it.
3. When a testator devises all his estate, both real and personal, to his wife during her life or widowhood, and at her death or on her marriage to be equally divided among his children, and also directs his estate to be kept together during her life or widowhood, "for the support, maintenance and education of the family," a son who has continued to reside on the farm with his mother after the testator's death, is a competent witness for her, in an action brought by her to recover for board, washing, &c., furnished after the testator's death.

ERROR to the Circuit Court of Madison. Tried before the Hon. L. P. Walker.

THE facts which relate to the first point decided by the court, are set out at sufficient length in the opinion. The plaintiff on the trial below introduced her son, Edwin Spotswood, as a witness. The defendants objected to his competency, on the ground of his being interested in the recovery, and to show his interest, introduced the will of his father, Elliott Spotswood, by which the testator devised all his estate both real and personal, to his wife (the plaintiff below) during her life or widowhood, and at her death, or on her marriage, to be equally divided among his children, and also directed that his estate should be kept together, during the life or widowhood of his wife, "for the support, maintenance and education of the family." Defendants also proved that since the death of his father, said Edwin Spotswood had continued to reside on the farm with his mother. The court overruled the objection, and the defendants excepted.

COOPER, for the plaintiffs in error:

1. A witness may have an excluding interest, yet not be a

party, nor one against whom the record could be read.—Roberts v. Trawick, 13 Ala. 83; Bean v. Pearsall, 12 ib. 592; 1 Greenl. on Ev. 416, and cases there cited. The witness could not have made himself competent, even by releasing all his interest in his father's estate.—Maury's Adm'r v. Mason's Adm'r, 8 Por. 211; Williams' Ex'rs v. Temple's Ex'rs, 6 Ala. 656; Powell v. Powell, 7 ib. 584; Sims v. Scott, 2 ib. 58.

2. The letter, marked C, should have gone to the jury, and it should have been left to them to determine the question of the daughter's agency. This agency did not depend on the construction of any writing, but on parol proof, and therefore the court erred in drawing to itself the question of the agency.—See Ely v. Adams, 19 Johns. 312. There the question was on the ambiguity of a letter, which was to be explained by the aid of parol proof, and it was held to be the province of the jury to dispose of it—see also, Bradford v. Bush, 10 Ala. 386.

In the case at bar the question is, did the plaintiff authorize her daughter to write the letter C, and this was a question for the jury, not for the court.

Agency may be inferred from facts, as a power to sell is a power to warrant.—10 Ala. 386; 13 ib. 286; 9 Por. 305; 1 Ala. 446; 4 ib. 720. In the case last cited, the plaintiff in a writ of error bond took his sureties with him, and went to the clerk to give the bond, but being pressed for time, he said, "Let us sign a blank bond, and you can then fill it up." The bond was signed in blank, and filled up by the clerk. It was ruled that the silent assent of the sureties authorized the clerk to fill up the bond.—See also, 1 Stew. 517; 13 Ala. 382; 3 ib. 564; 8 Barr, 501.

Again, Mrs. Spotswood was bound to know what her daughter, who was her agent, had written.—3 Barb. Sup. R. 529. Her daughter was a special agent, but had general power as to what she would write, as no detailed instructions were given to her; and to avoid plaintiff's responsibility for the letter, it would be necessary for her to show that McClung had knowledge of the restrictions on her agent's authority, if any had existed.—Routt v. Bank of Miss., 12 S. & M. 166; Lobdell v. Baker, 1 Met. 193; Story on Ag., § 137 and 73; Story on Con., § 287 and 135; 7 Wend. 446.

Special power to do a particular act, is the same as a general power to do all acts of a certain business, and private instruc-

tions do not affect third persons not cognizable thereof.—Story on Ag., § 73.

C. C. & J. W. Clay, for the defendant:

1. Edwin Spotswood was a competent witness.

A disqualifying interest must be some legal, certain, and immediate interest in the event of the suit, or in the record as an instrument of evidence.—1 Greenl. Ev., § 386; 1 Stark. Ev. p. 102. It must be a present, certain, and vested interest, and not uncertain, remote or contingent.—1 Greenl. Ev., § 390; 1 Stark. Ev. p. 103-4.

When the interest of a residuary legatee is very remote, it will not render him incompetent, but go to his credit.—2 Dallas' R. 95—see also, Carver v. Pearce, 1 Term R. 94; Duel v. Fish, 4 Denio, 516. The witness was competent, tried by every test laid down in the above authorities. The residuum, in which he is interested, is in no manner affected. He can acquire no legal right, incur no legal liability, receive no certain and immediate benefit, increase or diminish no fund in which he is interested, nor discharge himself from any liability, by the event of this suit. If plaintiff recovers, he will not thereby acquire any present, certain and vested interest in the amount recovered. If she is defeated, she alone will be personally liable for the costs. They cannot, by any possibility, be recovered from the residuary estate.

2. The letter was properly excluded from the jury.

I. The letter was not written by Mrs. S. She denies that she wrote it, and there is no evidence tending to prove that she did. But it is contended, that she authorized her daughter to write. This is very doubtful, since she has but a faint recollection of having told some one (whom she does not recollect) to write to McClung; while her daughter's recollection is, that when she offered to write, the defendant in error was silent. What she says on information from her daughter is legitimate evidence, as it was drawn out by the interrogatory of plaintiffs in error, and there is no evidence that it was objected to. The daughter says too, that what she wrote was written of her own will and accord and without instructions from her mother, and that her mother did not see the letter or assent to it afterwards. She is partially sustained by Edwin D. Spotswood. The plaintiffs in error have

adduced no evidence conflicting with this, and cannot be heard to say that the letter was, either directly or indirectly, her act. And having failed to connect her with the letter by other evidence, it was not proper for the consideration of the jury.

II. But, if we admit that the authority was given to write, from any fair construction of the circumstances surrounding her at the time, it is evident that the proper subject of the letter was the sickness of the girl, and not the board of the children. The general authority to write did not confer on the daughter a discretion to write about what she pleased. Nor, if authority was given to write about board, did it confer a discretion to write what she pleased. The law implies that authority to an agent carries with it or includes in it, as an incident, all the powers necessary, or proper, or usual as means to effectuate the purpose for which it was created.—Story on Ag., § 97. It was neither necessary nor proper for the daughter to write what she did, and it varies from the usual conduct of the defendant in error in regard to the board of the children. The agent exceeded the authority of the principal, and the latter is not bound by it.

III. Even if we were to admit that the letter was written by the defendant in error, and give it its full legal effect as her act, it would amount to nothing more than a simple declaration, which would not discharge plaintiffs in error from an existing legal obligation. The jury have decided from the other evidence in the case, that a legal obligation of the plaintiffs in error to pay board does exist; a legal right to the board having accrued to defendant in error, the letter (even if we go so far beyond the facts disclosed as to regard it her act) cannot impair that right. If the court below had (erroneously as we believe) sent the letter to the jury, it would have been bound to charge that the letter was perfectly consistent with the right of Mrs. S. to demand board, and that it in no wise impaired that right, and could not control or affect their verdict. In this view, if the court erred at all, it is an error without injury, for which this court will not reverse. McMillan v. Wallace, 3 Stew. 185. But it is evident from the proof that the letter was not the act, directly or indirectly, of defendant in error, and was properly excluded.

DARGAN, C. J.—This was an action of assumpsit brought by the plaintiff in error for the board of two of the infant chil-

dren of the defendant's testator. After the plaintiff had introduced proof in support of her account, the defendants read in evidence a letter written by the testator to the plaintiff, in which he expressed his surprise at her demand for board, and stated that he was not able to pay the expenses of boarding his children, as he had plenty of house room for them at home, and if she felt it was her duty to charge for their board, he must take them home where they could be attended to without any extra expense. The letter then concludes thus: "That there may be no misunderstanding, I will state that I never understood that there was to be any charge for board. I therefore decline paying it, either for the past or the future, and if they are expensive to you, you can either send them home or I can send for them. Judy was retained as a nurse; as she is no longer needed in that capacity, you will please send her home." In reply, the testator received a letter purporting to be signed by the plaintiff, which is in the following language: "I am sorry that I wrote to you for the board of the children, but thought it was nothing but right for me to do so. You can do as you please about it, pay or not pay. I will never give the children up until I am obliged to do so. I will keep them and share the last cent I have with them. As for Judy, the children need as much nursing now as when they were younger. If you wish her to come home, I will send her, and I will have to have some one else to attend them. She is not well enough to go in this morning." It appeared that this letter was written by a daughter of the plaintiff, and its contents were not known to her, but the evidence conduced to show that upon the receipt of the letter of the testator, the plaintiff being engaged in waiting on the girl Judy, who was sick, requested, or authorized her daughter to answer it, but did not direct the character of the answer, nor give her any instructions what to write. This letter upon the motion of the plaintiff was excluded from the jury, and the defendants excepted. Without inquiring at this time into the effect that this letter would or should have had upon the minds of the jury in rendering their verdict, we will examine only the question of its admissibility as evidence. It is certainly true that the acts of an agent are not binding on the principal until it be shown that he was authorized by his principal to do the acts, or unless the principal has assented to, or ratified them,

after they were done. But in most cases, if not in all, the question of agency is a matter of fact, which it is the province of a jury to determine upon under the instructions of the court, and if the testimony tends to prove that the person acting as agent had authority from his principal to do the act, then it is manifest that the court cannot exclude from the jury the act itself, without overstepping the law of its duty and assuming to determine a matter which belongs to the jury, to-wit, the authority of the agent to do the act. The correct rule is this, if there is no proof whatever tending to prove the agency, the act may be excluded from the jury by the court, but if there is any evidence tending to prove the authority of the agent, then the act cannot be excluded from them, for they are the judges of the sufficiency and weight of the testimony. Applying this rule to the action of the court in excluding the letter purporting to be written by the plaintiff to the defendant's testator, we are constrained to hold that the court erred, for there can be no question but that there was evidence conducing to show that the letter was written by the plaintiff's authority, and it was for the jury and not for the court to determine on the sufficiency of this evidence. But we apprehend that the reason which influenced the court in rejecting the latter was, that it did not appear that the plaintiff dictated the terms of the letter or knew its contents. But the question whether the letter was written in conformity with the authority given to write it, was also in this case a question of fact for the jury. Indeed, in most cases where the authority is given by parol, the question whether the agent has exceeded his authority is a question of fact to be decided by the jury under the instructions of the court.—See McMorris v. Simpson, 21 Wend. 610. But independent of this view, I am clearly of the opinion that if the plaintiff's daughter was authorized to answer the letter of testator, but was not instructed as to the character of the answer to be given, and in consequence of the answer received the defendant's testator forebore to act or to take his children home, then the plaintiff is as much bound by the letter as if she had expressly dictated its terms; for if a principal clothes his agent with authority calculated to induce others to believe that the agent has full powers to act, the principal must be bound thereby, otherwise third persons acting in good faith might be injured.—See Wilcox v. Routh, 9 S. & M.

476. Indeed, if the authority is general, and the agent is limited by secret instructions as to the mode of executing it, the party dealing with the agent cannot be bound by such secret instructions, unless he was apprized of them.—Story on Ag., § 73, and cases there cited. It will follow conclusively from this, that if the authority to do the act is given, but the mode or manner of executing the authority is not expressed even to the agent himself, the party dealing with him is not to be affected if the act be within the scope of the authority, although it be not done in the manner that the principal desired, or would himself have done it. We therefore think, that if the plaintiff authorized her daughter to answer the letter of the defendant's testator, but did not prescribe the character of the answer, and the answer in fact influenced the testator and induced him not to take his children home, the plaintiff must be held as much bound by the answer as if she herself had written it.

In no point of view can the ruling of the court be sustained in rejecting the letter as evidence, and for this error the judgment must be reversed.

We cannot see that the son of the plaintiff had any interest in the money that might be recovered in this action, and therefore hold that there was no error in admitting his evidence.

Let the judgment be reversed and the cause remanded.

PARSONS, J., not sitting.

WINN *vs.* FREELE.

1. A *certiorari* from the County Court does not lie to review the judgment of a Justice of the Peace, in a proceeding instituted under the Act of 1841, (Clay's Dig. p. 358, § 3,) to recover damages, where the amount claimed does not exceed twenty dollars.
2. Consent of parties cannot confer jurisdiction, when the law excludes it.

ERROR to the County Court of Tallapoosa.

FALKNER, for plaintiff in error.

LEFTWICH, *contra.*

CHILTON, J.—The petition for the writ of *certiorari*, which was exhibited in this case to the county judge, sets forth that this was *an action of damages* brought by the defendant in error, who was plaintiff, and that the justice gave judgment against the petitioner for the cost, &c. The proceeding must have been under the act of 1841, (Clay's Dig. 358, § 3,) which extends the jurisdiction of justices of the peace to all cases of damages, (except actions of slander) when the amount claimed does not exceed twenty dollars; for until the passage of that act, justices of the peace had no jurisdiction in such cases.—Cavender v. Funderburg, 9 Por. 460; Williams v. Hinton, 1 Ala. 297. The act of 1841, according to the construction placed upon it by this court (in Waddle v. Dumas, 13 Ala. 412,) allows an appeal in such cases only to the *Circuit* Court, and not to the County Court. It follows therefore, that the County Court had no jurisdiction of the case before us.

It is insisted however, by the counsel for the defendant in error, that the objection to the jurisdiction must be considered as waived, because the plaintiff in error submitted without raising such objection in the court below. This position would be right, if the County Court had appellate jurisdiction of the subject matter, but the law gives that court none, and the consent of parties cannot confer it in a matter which the law excludes.—Wyatt et al. v. Judge, et al. 7 Por. 37; 8 Por. 554; 3 McCord, 280; 1 N. & M. 192; 1 Bibb 263; Bouv. L. Dic. tit. Jurisdiction. It results that the judgment of the County Court must be set aside, and judgment here rendered dismissing the *certiorari.*

McBROOM'S ADM'RS *vs.* McBROOM'S CREDITORS.

1. When the order transferring a cause from the Orphans' Court to the Court of Chancery, assigns no reason for the transfer, but the record discloses a sufficient reason, and the parties appear and proceed with the cause, without objection, in the Court of Chancery, an objection to the jurisdiction of that court, on account of a mistake in the decree, setting forth the reason of the transfer, cannot be raised in the Appellate Court, and the mistake itself is immaterial.
2. A mistake in the given name of a party against whom a decree has been rendered, when the true name appears in the record, is a clerical misprision, and will be corrected in the Appellate Court, at the cost of the plaintiff in error.
3. When the record of the Orphans' Court contains no report or decree of insolvency, a mere recital in the order of publication against creditors, that the estate had theretofore been reported and declared insolvent, does not give the Court of Chancery, to which the cause has been transferred, jurisdiction to proceed to a settlement of the estate as an insolvent estate.

ERROR to the Chancery Court of Madison. Tried before the Hon. D. G. Ligon.

THE final settlement of the estate of Wm. McBroom, deceased, by Richard B. Purdom and Thomas McBroom, administrators *de bonis non*, was commenced in the Orphans' Court of Madison. A minute entry in the proceedings of that court recites, that on account of the relationship of the judge to one of the administrators, the circuit judge being notified of the fact, had appointed commissioners to state the amount, and make report thereof to the court. The commissioners made their report, and it was recorded. A subsequent order recites that the parties interested in the settlement appeared in open court by their attorneys, and agreed that the settlement made by the commissioners should be set aside, and it was therefore ordered, that said settlement be set aside, and said cause transferred to the Chancery Court, but no reason for the tranfer is assigned in the order. The chancellor, in his interlocutory decree referring the case to the master, stated that the cause had been transferred from the Orphans' Court, "on account of the interest of the judge of that court," and this is the first error assigned.

C. C. & J. W. Clay, for plaintiffs in error:

1. The order of the Orphans' Court does not show for what cause the case was transferred to the Chancery Court, and the chancellor had no right to assume that it was because of the interest of the judge of that court.

2. The master's report states the account against Richard B. Purdom and *Stephen* McBroom, administrators, &c., and the decree is also against *Stephen* McBroom, while the record shows that *Thomas* McBroom was the administrator, not *Stephen* McBroom.

3. The report of insolvency does not appear in the record, and without it the proceedings are irregular, and must be reversed.—Clay's Dig. 192, § 2, 3, &c.; Clarke v. West, et al. 5 Ala. 126; Lambeth & Wife v. Garber, 6 Ala. 870.

The mode of proceeding in the settlement of solvent and of insolvent estates, under the statute, is entirely different. In the settlement of a solvent estate, the parties to the decree must necessarily be the executor or administrator on one side, and the *distributees* on the other.—Merrill v. Jones, 2 Ala. 192; reaffirmed in Davis v. Davis, 6 Ala. 613.

In the settlement of an insolvent estate, the parties to the decree are the executor or administrator on one side, and the *creditors* on the other.—Clay's Dig. 194, § 12. It is only in insolvent estates, that the court may decree in favor of each.

James Robinson, *contra:*

1. The record shows that in consequence of the relationship of the judge of the Orphans' Court to one of the administrators, he notified the circuit judge of that fact, who appointed commissioners to settle and state the account. Afterwards, by consent, this was set aside, and the cause transferred to chancery. It is too much to say, that because an improper order was set aside by consent, that the relationship of the judge was destroyed. Whilst that relationship existed, it was proper to send the cause to the Chancery Court.

2. It is admitted that there is a clerical misprision in stating the account, and rendering the decree against *Stephen* McBroom, instead of *Thomas* McBroom. But the record shows what the true name of the administrator is, and the amount for which a decree ought to be rendered. This court will therefore

correct the mistake, and render a proper decree here, for the amount ascertained to be due from the administrators.

3. As to the want of jurisdiction. This objection seems to be two-fold. 1. That on the final settlement, the estate proved to be solvent. If this objection were good, it would follow that the administrator, by reporting an estate insolvent, could keep off all remedy at law of the creditors, and at the same time by the fact of solvency, prevent a settlement and distribution by the Orphans' Court. Thus he might keep the assets of the estate as long as he chose.

2. That there is no sufficient report of insolvency:

The case of Lambeth & Wife v. Garber, 6 Ala. 870, which is cited to sustain this point, has been overruled by McLaughlin, Adm'r. v. The Creditors of Nelms, 9 Ala. 925. Even if the objection were good, the plaintiffs in error have waived their right to insist upon it. The objection was not raised before the Orphans' Court, before the master, or before the chancellor, but the plaintiffs appeared before them all, and treated the estate as if duly and regularly reported insolvent. They thus virtually admitted that it had been reported insolvent. The question is not, whether the estate is insolvent, but whether it *has been reported* insolvent; and this can be shown as well by the minute entry, which is the act of the court, as by the report itself, which is the act of the party.

CHILTON, J.—1. It is assigned for error, that the chancellor assumes that the cause was transferred from the Orphans' Court in consequence of the interest which the judge of that court had in the subject matter. The order transferring the cause does not show upon what ground the transfer was made. It does appear however, from another part of the record, that the judge of the Orphans' Court was incompetent to act, by reason of his relationship to Thomas McBroom, one of the administrators. It does not appear that any objection of this kind was made in the court below, but on the contrary, the parties appeared in the Chancery Court, and proceeded with the cause. Under these circumstances, as the record discloses good ground for the transfer, we think the jurisdiction of the Chancery Court should not be questioned in this court, and that the mistake in setting forth the reason for the transfer in the decree is immaterial.

2. The report of the register states the account against Richard B. Purdom and *Stephen* McBroom, adm'rs. &c., and the decree following the report is also against Stephen, whereas, the whole of the proceedings show that *Thomas* and not Stephen McBroom was the administrator, and this constitutes the 2d and 3rd assignments of error. It is most manifest that the error here complained of was a clerical misprision, and as such, falls within the letter as well as the spirit of the statute, allowing amendments to be made.—Clay's Dig. 321, § 50, ib. 322, § 54. The section last referred to requires this court to amend at the cost of the plaintiffs in error.

3. It is however objected, that this estate has been settled as an insolvent estate, and that the record furnishes no evidence, (such as the chancellor could regard) of the report of such insolvency, and a decree of the Orphans' Court predicated upon the report. It appears that on the 27th February, 1845, the following entry was made in the Orphans' Court. "The estate of William McBroom *having been heretofore reported and declared* insolvent, it is ordered that all persons having claims against said estate, to file them in this office on or before the first day of September next." Then follows an order of publication to be made, that creditors file their claims in the office of the clerk of the County Court, properly authenticated, on or before the first day of September, 1845, or the same would be forever barred. There is nothing farther apparent in the record of the proceedings to show that this estate was reported or declared insolvent. Is this sufficient to give the court jurisdiction of the estate, so as to decree in favor of creditors, as in case of insolvency under the statute?—The cases of Clarke v. West, 5 Ala. 117, and Lambeth & Wife v. Garber, et al. 6 Ala. 870, fully answer this query in the negative. In the case first cited, it was held, that the report of insolvency not appearing in the record, all the proceedings in the County Court, treating the estate as insolvent, were irregular, and subject to reversal, and it was further said, that the recitals of the report in the various orders could not control the defect; that the report being the only evidence of what it contained, could not be ascertained by the consideration given to it by the court. The subsequent case in 6 Ala. 870 sustains the former decision. In the case before us, it does not appear when or by whom this estate was report-

ed insolvent. No report appears, nor any schedule showing the condition of the estate, with respect to its debts and assets, &c. Neither is there any decree, declaring the same insolvent, but a bare recital, that it had "heretofore been reported and declared insolvent." Such recital we think wholly insufficient to confer the jurisdiction here exercised. The case before us is not analagous to the case of McLaughlin, adm'r. v. The Creditors of Nelms, 9 Ala. 925, where it was held that an administrator could not object to the regularity of an order declaring the estate insolvent, *made upon his own report*. The declaration of insolvency appeared in that case, and was made upon the report of the administrator. Here it does not appear, and the estate in fact appears to be perfectly solvent. We feel very sure that the decree cannot be supported. It must therefore be reversed, and the cause is remanded.

FALKNER *vs.* THE JUDGE AND COMMISSIONERS OF RANDOLPH COUNTY.

1. When a county treasurer, who has instituted legal proceedings against the clerk of the county for certain demands due from him to the county, fails in his suit, and judgment is rendered against him for the costs, the costs of the suit are not an ascertained or established claim against the county in favor of any person.
2. The Commissioners' Court cannot be compelled, by *mandamus* from the Circuit Court, to make an appropriation for the payment of claims against the county, before they have been audited and allowed.

ERROR to the Circuit Court of Randolph. Tried before the Hon. John J. Woodward.

FALKNER, for plaintiff in error:

Where it is the duty of the Commissioners' Court to make an appropriation out of the county treasury and they refuse to do so on application, the only remedy is by *mandamus*.—See

Cuthbert v. Lewis, 6 Ala. 262; Boone v. Todd, 3 Missouri, 140; Tarver v. Comm'rs Court, 17 Ala. 527.

The verdict of the jury and judgment of the Circuit Court in the original case, (which is admitted by the demurrer,) ascertains the amount due the plaintiff, and leaves the Commissioners' Court no discretion, and consequently they have no just ground for refusing the appropriation.—See Case et al. v. Collins et al., 19 Wend. 56; State v. Mahew, &c., 2 Gill, 487; Bright v. Supervisors of Chenango, 18 Johns. 247; Hall v. Supervisors of Oneida, 19 ib. 259.

The statute provides that it shall be the duty of the county treasurer, on or before the 1st Monday in November, to examine the clerk's records, &c. and to bring suit for moneys not paid over, &c.—See Clay's Dig. 578, § 15. In default, he is liable to pay not less than $100, and not more than $200.—See ib. 580, § 27.

To move against clerk failing to pay money—see ib. 146, § 23.

Commissioners' Court is required to audit and allow all claims legally chargeable.—Ib. 142, § 1.

No counsel for defendants.

PARSONS, J.—The plaintiff moved the judge and commissioners of Randolph county, sitting as a Commissioners' Court of roads and revenue, to make an appropriation for the payment to him of the sum certified by the jury in his favor, and also the costs of the suit; the court refused; and thereupon, by his petition stating the facts, he applied to the Circuit Court for a rule upon the judge and commissioners, to show cause why a *mandamus* should not be granted, to compel them to make the appropriation. The defendants demurred to the petition, and the Circuit Court sustained the demurrer, and the plaintiff now assigns that as error. The motion in the Commissioners' Court had not for its object the allowance of the plaintiff's claims; the court was not requested to audit and allow his claims, but to make an appropriation to pay the amounts. The motion was evidently made upon the supposition, that the claims were conclusively established, and that nothing more was necessary, except an appropriation and payment. It does not appear why the Commissioners' Court refused the motion, but we think there

was a sufficient reason for doing so, and we will presume that the Commissioners' Court acted on it.

The treasurer of that county had instituted a suit or legal proceeding in the Circuit Court, against the plaintiff, as the former clerk of the County Court, to recover certain demands against him, in favor of the county. But the treasurer failed in his suit, and the jury certified the sum of $39 70-100 in favor of the defendant in that suit, who is the plaintiff in error, and he also recovered a judgment against the treasurer for the costs, but the Circuit Court refused to render judgment for the sum certified by the jury, for some reason which does not appear. The sum certified and the costs, however, were the two claims presented to the Commissioners' Court by the plaintiff in error, who requested an appropriation, which was refused. It does not appear for what or why the jury certified the sum mentioned; nor does it appear that there was any plea or notice of set-off. We must presume the Circuit Court thus rejected the certificate for some sufficient reason, as nothing to the contrary appears. Perhaps the jury, under the issues joined, (and it does not appear what they were) had no right to do so. That part of their verdict, unsanctioned, as it is, by the court, is a mere nullity, and it is legal evidence of nothing. If the plaintiff had presented his claims, which he probably proved to the jury, to the Commissioners' Court, to be allowed as claims against the county, which properly precedes an order of appropriation, the allowance might have been made.

His other claim is the amount he recovered as costs in the suit. By one of the acts, (Clay's Dig. 578, § 15,) the sense of which is somewhat obscure in consequence of an error in the punctuation, the county treasurers are authorized to bring suits for all debts or demands in favor of their counties; and it is clear from the acts, that in proper cases it is their duty to do so. In his suit against the plaintiff in error the treasurer failed, and the plaintiff in error recovered judgment against him for the costs. But it does not appear whether the costs were so recovered against the treasurer individually, or were to be levied of the goods, &c. of the county. Without deciding that a judgment could legally be rendered in the latter form, it is sufficient to say, that it does not appear by the record before us that it was so rendered. Taking it, therefore, as a judgment against

the treasurer individually, it may be very proper for the county to pay him the amount which he may pay in discharge of it. But it also may be very just and proper for the county to withhold every indemnity, as if he brought the suit maliciously, and without probable cause. Therefore, the costs were not an ascertained or established claim against the county, in favor of any person. The commissioners were not bound to make the appropriation, without being called on first to audit and allow it.

By another act (Clay's Dig. 142, § 1,) the judge of the county and commissioners are required to audit and allow on due proof, all accounts and demands legally chargeable upon their respective counties, and the accounts so allowed are to be recorded by the clerk, and the claimant is to receive a warrant on the treasurer, signed by the clerk, for the amount so allowed, and the clerk is to number the warrant, &c.

Another act, (Clay's Dig. 578,) provides that it shall be the duty of the county treasurers to register all the authenticated claims which may be presented against their counties, designating the date of the claims, and the date of filing the same, (which shall also be endorsed on the claim,) the name, number and amount, also in whose favor the same is, which shall be numbered and registered in the order in which they are received, *and paid accordingly, and not otherwise.* It is first in order to audit and allow, and afterwards to pay, or to make an appropriation to pay. As the Commissioners' Court was called on to do the last first, it had a right to refuse.

The judgment is affirmed.

McLANE & PLOWMAN *vs.* RIDDLE & BURT.

1. When the assignor of a note and his assignee join in a bill, the admissions of the assignor before the commencement of the suit are sufficient evidence of the assignment.—(Overruling Moore et al. v. Hubbard, 4 Ala. 187.)
2. The title of the assignee of a note, in a bill filed jointly with his as-

signor, is sufficiently established by proof that the note was assigned *in liquidation of a debt* due to him from his assignor, although the bill alleges that it was assigned *as collateral security*.

3. When an amendment to a bill is properly allowed, the appellate court will not review the decision of the chancellor in allowing the amendment without terms.

ERROR to the Chancery Court of Talladega. Tried before the Hon. D. G. Ligon.

RICE & MORGAN, for plaintiffs in error:

1. An order for leave to amend a bill by adding a plaintiff will not be granted after replication, or after publication, or after the lapse of a year after a trial and reversal of the decree in the Supreme Court, especially if the plaintiff has been guilty of laches. In this case the plaintiffs knew the matter of the amendment before the original bill was filed, and there is gross laches.—1 Dan. Ch. Pr. 459; Milward v. Oldfield, 4 Price, 325; Pleasants v. Logan, 4 Hen. & M. 489. The leave to amend is granted to Riddle, and it is to make "J. C. & J. T. Burt complainants." This is no authority to make *James* C. and *Joseph* T. Burt complainants.

2. An amendment must not make a new case, nor will it be allowed without a showing.

3. If such an amendment as is allowed in this case can be allowed at all, it must be upon the payment of all the costs up to the time of the amendment, and of the amendment itself.—Jennings v. Springs, 1 Bailey's Eq. R. 181; 1 Dan. Ch. Pr. 457.

4. In every case the plaintiffs must recover upon the strength of their own averments and proofs. The supposed "quibbling" of an answer cannot entitle complainants to relief, in the absence of proof of material averments of the bill.—McKinley v. Irvine, 13 Ala. 695. It is well settled that nothing is admitted by the silence or "quibbling" of an answer, unless it be charged to be in the knowledge of the defendant. And here the alleged "quibbling" is as to matters not pretended to be in the defendant's knowledge.—14 Ala. 754; 8 ib. 772; Thompson v. Carson, 1 Por. 257.

5. Where there are three complainants, the proof must show that all are entitled to recover, or the bill will be dismissed.—Moore v. Moore, 17 Ala. 631. (In this case there is not a shadow of proof of any right or interest in James T. Burt.)

6. It was necessary that the interests of the Burts should be alleged and stated, and how acquired.—Plowman & McLane, 14 Ala. 169. (This is not done, for they do not say who owes the debt, for which they say they hold the note as collateral security.) It was necessary to prove these allegations as made, and to prove their derivative title as asserted.—McKinley v. Irvine, 13 Ala. 695-700.

There is no proof that the Burts acquired the note as collateral security for a debt Riddle owed them—nor is there any proof that Riddle owed them any debt, or that any body owed them a debt.

An admission on information and belief, that a note belongs to A. and B., or to one of them, does not prove that A. and B. acquired it from R. as collateral security for a debt R. owed them. It does not prove the debt, nor the joint interest in A. and B., especially when the source of the information and its contradictory character is pointed out in an amended answer. Such admissions are insufficient, because proof in the alternative—that is, that A. and B. or one of them was owner, would not be sufficient to establish a joint ownership in A. and B. When the witness says the note was owned by A. and B. or one of them, how can a court say A. and B. are the owners? Is it not just as rational on such proof to say that "one of them" is the owner? Such proof is too uncertain for any decree.

White & Parsons, *contra.*

DARGAN, C. J.—The object of the original bill was to enforce the payment of a note for three hundred dollars, (made by the plaintiffs in error, payable to Riddle,) by a sale of the premises described in the pleadings, upon which Riddle asserted a lien. This bill was filed in the name of Alexander Riddle, for the use of James C. and Joseph T. Burt, but was afterwards amended and the Burts made parties complainants. The amended bill alleges that the note was held by James C. and Joseph Burt as collateral security, to secure a debt due to them from Alexander Riddle, their co-complainant. The answer of McLane to the original bill alleges that Riddle had no interest in the note, but that he had assigned all his interest, legal and equitable, to the Burts, *or to one of them.* This statement was made upon information and belief. In his answer to the amended bill he ad-

mits that one or both of the Burts have an interest in the note, but does not know whether both have or one only, and insists on proof to establish the interest of both. Mr. Knox was examined by the complainants, who states that before this bill was filed he had a conversation with Riddle, in which Riddle informed him that he had transferred the note to the Burts, in liquidation of a debt he owed them, and that he received the note from one of them for the purpose of bringing a suit at law against the makers. The chancellor rejected that portion of the evidence of Knox relative to the admissions of Riddle; but believing that the answer of McLane showed an interest in both the Burts, decreed in favor of the complainants. To revise this decree a writ of error is brought, and the first and most important objection is, that there is no proof that James C. and Joseph T. Burt both have an interest in the note.

I shall not place my opinion upon the admissions of the answer, for if it were admitted that they did not show a joint interest in the Burts, still the complainants were entitled under the pleadings and proof to a decree. In the case of Anderson v. Ryan, 3 Madd. Ch. R. 174, an assignor and assignee joined in a bill alleging the assignment. The defendant answered that he had no knowledge of the assignment, but admitted his liability to the assignor. At the hearing it was objected, that no decree could be rendered, because the assignment was not proved. But it was held, that the filing of the bill in the names of the complainants, alleging the assignment, was an admission as between them of the interest of the assignee, and that this admission was sufficient, inasmuch as the defendant had no interest in it, nor could he in any manner be affected by it. Now I do not intend to go so far as to hold that the allegations of the bill are evidence of the interest of the Burts. I think they should be considered as pleading merely. But I hold that the admissions made by Riddle *before the filing of the original bill*, that he had transferred the note to James and Joseph Burt, are evidence of their interest, and consequently the chancellor should have regarded this portion of the evidence of Knox. It is true that one cannot make evidence for himself by his admissions; but when they are made against his interest they are evidence against him, in favor of those who claim in opposition to him. As between Riddle and the Burts, these admissions are evi-

dence, and the rights of the defendants are in no wise affected by them, and consequently they may be received to show that the decree should have been rendered in the joint names of all the complainants. It is a general rule, with but few exceptions, that the answer of one defendant is not evidence against another. Yet when the right of the complainant as against one defendant is only prevented from being complete, by some question between the plaintiff and the second defendant, the answer of the second defendant may be read as evidence. Thus, if a mortgage is assigned, and the assignee files a bill against both the mortgagor and the assignor, and the mortgage is proved and the assignor admits the assignment, the complainant will be entitled to a decree, notwithstanding the mortgagor may deny all knowledge of the assignment.—See 2 Dan. Ch. Pr. 982; 3 Hare, 165. The reason of this is, that the mortgagor has no interest in the assignment, and as the answer of the assignor estops him, the equity of the assignee is complete. If the answer of the assignor is evidence to prove the assignment, his admissions made before the bill is filed *must be* evidence of the same fact. I admit that this view is inconsistent with the case of Moore et al. v. Hubbard, 4 Ala. 187, but I am entirely satisfied that the decision in that case cannot be sustained. The partners in that case who had sold their interest, were defendants to the bill, and they admitted the transfer by their answer. This court held this admission not to be evidence of the transfer against the other defendants. The error of this opinion consists in this, that the answer of the partners who had transferred their interest would bind them, and would always be evidence as between them and the complainant of the transfer, and they never could afterwards successfully assert their interest, for their answer would show that they had none, and when the record itself contains conclusive evidence of the assignment as between the assignor and assignee, the assignment is established, and the defendant against whom the equity exists may safely pay to the assignee.

As the equity against the defendants was clearly established, and the only question was whether Riddle had transferred the note to the Burts, the testimony of Knox proving Riddle's admissions was evidence of that fact.

But it is again insisted that the title of the Burts as alleged is not proved by the admissions of Riddle. The title alleged is,

that Riddle transferred the note *as collateral security*, and his admissions were that he transferred it *in liquidation* of a debt he owed the Burts. There is nothing in this objection; *for admitting* that we are to infer from the term liquidation, that the transfer was in absolute payment of the note, still this would prove the title of the Burts to the note. Their title consists in the transfer. When this is proved, their title is proved, and it is immaterial in this suit to enter into an inquiry as to the terms or conditions of the transfer. All that is necessary to be ascertained is the fact of the transfer of the note to the Burts.

It is also contended, that the chancellor erred in allowing the bill to be amended by making the Burts complainants, without imposing terms upon the complainants. We will not say but that the chancellor might have imposed upon them the cost, or some part of it, as a condition upon which the amendment should be allowed. But this is a matter we will not review. The amendment itself was correctly allowed. This being so, we cannot reverse the decree because the amendment was allowed without terms. There is no error in the decree, and it must be affirmed.

Chilton, J., did not sit in this case.

MONTGOMERY AND WEST POINT RAILROAD COMPANY *vs.* VARNER.

1. In assessing the damages occasioned by the construction of a Railroad to a person through whose lands the road passes, a witness cannot state *his opinion*, as to the amount of damage sustained.

Error to the Circuit Court of Chambers. Tried before the Hon. John J. Woodward.

Semple, for plaintiff in error:

1. Opinions, belief, deductions from facts, and such like, are matters which belong to the jury, and by which they arrive at

their verdict. When the examination extends to these, the judgment of the witnesses is substituted for that of the jury, and their province invaded.—1 Greenl. Ev. 515, § 440; Andrews & Bros. v. Jones, 10 Ala. 460; Jones v. Donnell, 13 Ala. 511; Lincoln v. Saratoga and Schenectady R. R. Comp. 23 Wend. 432-3-4.

2. In no case has a witness been permitted to speak to the amount of damage, that being exclusively for the jury, who are presumed to be impartial.—Norman v. Wells, 17 Wend. 161-2-3.

3. The measure of damage to property, is the diminution in its value, market value, and not the estimate which a witness might place on its diminished value to him, if he were the owner.—Ivey v. McQueen, 17 Ala. 408.

No counsel for the defendant.

DARGAN, C. J.—This proceeding was commenced by the Montgomery and West Point Railroad Company before a justice of the peace, in accordance with the provisions of their charter, to ascertain the value of the land, stone, gravel and timber, that might be used by the company in constructing their railroad over the lands of Alexander Varner. A jury was impannelled, who returned a verdict, assessing the value at two thousand and eight dollars. The company appealed to the Circuit Court, and prayed a trial *de novo*, which they are allowed to do by their charter. Upon the trial in the Circuit Court, Varner introduced a witness, who was a planter, and had examined the land over which the road passed, with reference to the injury done to it. He was then asked by the defendant, what in his judgment was the damage done to the land of the defendant by reason of the construction and passage of the railroad over it. To this question the plaintiffs objected, but their objection was overruled.

The general rule is, that witnesses must depose to facts, and cannot be allowed to give their opinions founded on these facts, or the inferences or deductions which they have drawn from them. To this general rule, there are many exceptions, most of which are noted by Mr. Greenleaf, in his work on Evidence, vol. 1, § 440; and the question before us is whether this case proves one of the exceptions to the general principle. When

the question to be ascertained is the value of property, the opinion of witnesses as to its value is frequently admitted, and in many cases it would be difficult, if not impossible, to prove the value in any other mode.—Kellogg v. Krauser, 14 S. & R. 137; C. & H. notes to Phil. Ev. vol. 2, 760. But I have not been able to find any case that holds the opinions of witnesses, as to the *quantum* of damages resulting from any act, competent proof.

In the case of Lincoln v. The Saratoga and Schenectady Railroad Company, the plaintiff received an injury through the neglect of the agents of the defendant, by which he was prevented from attending to his business. The Supreme Court of New York held, that the plaintiff might show the character and extent of his business, and the importance of his personal attention to it, for the purpose of showing the extent of the damages sustained, but that he could not ask the opinion of the witnesses as to the amount of his loss, owing to his inability to superintend his business.—23 Wend. 425. In the case of Norman v. Wells, 17 Wend. 137, one of the questions was, the *quantum* of damages arising out of a breach of covenant, under the following circumstances. The defendant had leased a mill for sawing mahogany, and had covenanted not to establish any other mill for the same purpose on the same creek. The breach assigned was, that the defendant had established another mill on the same creek. The plaintiff proposed to prove the *quantum* of the damages he had sustained, by the opinion of the witnesses. The court held this proof inadmissible.—So in the case of Herrick v. Lapham, 10 John. 281, the court said, that to call upon witnesses to state whether the plaintiff had not sustained material injury by reason of the slander alleged to have been spoken of him by the defendant, would be to put the witness in the place of the jury, and to allow him to draw conclusions for them. I cannot at this time imagine a case, where it would be lawful to ask a witness his opinion as to the amount of damages resulting from an act, or from given facts, though I will not say that it could not be done in any case. But I feel entirely satisfied, that the opinion of the witness in the case before us was inadmissible. The amount of the damages was the question for the jury to determine, under all the facts and circumstances, and to permit the witness to give his opinion as to the

quantum of these damages, without even detailing the facts and circumstances upon which his opinion was founded, *was manifestly erroneous.*

The witness should have stated the quantity of land, gravel, stone and timber taken by the company, (and which belonged to Varner) in the construction of the road, and he might also state the value of each. He could also state any other fact, that would tend to prove inconvenience and injury to the defendant, in consequence of the road, such as the necessity of erecting more fencing, or any thing else that tended to show, that the labor of the defendant was increased in consequence of the road, or his convenience diminished, and from these facts, the jury and not the witnesses are to ascertain the *quantum* of damages suffered by the defendant.

Let the judgment be reversed, and the cause remanded.

POLLARD *vs.* COCKE.

1. When both plaintiff and defendant in an action of ejectment claim under purchases at sheriff's sales under executions against the same person, the plaintiff is not bound to prove the nature or quality of that person's title; it is sufficient if he can establish it in himself.
2. The deed of a sheriff or marshal cannot be collaterally impeached on account of any irregularities in his proceedings, or in the process under which he sold the land.
3. When land is sold under an *alias* execution, and no objection to its regularity is made in the court below, it will be presumed that a previous execution was regularly issued.
4. If a deed is not registered within the six months prescribed by the statute, nor until after the rendition of a judgment against the vendor in favor of a creditor who had no notice of the deed, its subsequent registration cannot relate back so as to defeat or postpone the lien of the judgment.
5. Judgments rendered in the Circuit Court of the United States create a lien on the lands of the defendant within this State, co-extensive with the lien of judgments rendered in the State Courts.
6. The statute which requires the registration of deeds within six

months after their execution, applies to the deeds of sheriffs and marshals.

7. A sale made in the Southern District of this State, by the United States Marshal of that District, of lands situated in the Middle District, is absolutely void; and his deed to the purchaser may be impeached collaterally.

ERROR to the Circuit Court of Tallapoosa. Tried before the Hon. E. Pickens.

PARSONS and BELSER & HARRIS, for plaintiff in error:

1. One of Pollard's titles consists of a deed from Joseph G. Lindsey, the patentee of the lands in controversy, to Thomas Huggins, dated the 27th February, 1840, recorded 3rd March, 1840, in Macon county, and in Tallapoosa county, 5th June, 1847; a judgment rendered in the Circuit Court of Macon county, 24th October, 1842, in favor of Knox v. said Huggins; an *alias fieri facias* of June, 1847; and a levy and sale of said lands to Pollard at the court house door of Tallapoosa county, in September, 1847; and also a deed of the latter date.

This title is good against the plaintiff, because at the time of the rendition of his judgment in the Circuit Court of the United States at Mobile, on the 23rd December, 1840, Lindsey had no interest in the land, but the right to it had passed from him, by the deed executed by him to Huggins, on the 27th February, 1840; because further, the plaintiff had actual notice of this deed before his purchase, and because the judgment of Knox, from the Circuit Court of Macon, of the 24th October, 1842, is the first which binds the lands.—Garwood v. Garwood, 4 Hals. 193; Priest v. Rice, 1 Pick, 164; Hiern v. Mill, 13 Vesey, 120; Daniels v. Sorrells, 9 Ala. 445; Morris v. Ellis, 3 Ala. 560; Forrest v. Lyon, 16 Ala. 646; Clay's Dig. 216, § 76; Elmore v. Harris, 13 Ala. 360.

2. It is at least questionable, whether judgments from the Circuit Court of the United States bind lands throughout the State, like judgments from the State Courts. It is, however, stated by way of dicta in one of our decisions, that they do.—Campbell v. Spence, 4 Ala. 549; Clay's Dig. 205, § 17.

3. If each of the judgments under which the parties claim binds the lands from their rendition, then none of them have become dormant. To render a judgment dormant, mere delay to

execute it is not sufficient.—Rankin v. Scott, 12 Wheaton, 177; Patton v. Hayter, 15 Ala. 20; Bank v. Boughton, ib. 128; Wood v. Gary, 5 Ala. 43; Michie v. Bank, 4 Howard, Miss. 130; Ridgely v. Gartrell, 3 H. & McH. 450.

4. Even should the judgments from the Circuit Court of the United States in Mobile bind the lands from their rendition, still Pollard's title, derived through that court, is better than that of the plaintiff. The judgment of Pollard is the oldest. The sale in Mobile, instead of Tallapoosa county, does not vitiate the sale to Chandler, and the deed from the marshal to Chandler was recorded in Tallapoosa county, before plaintiff's execution was sued out, or his purchase made. And besides the plaintiff had actual notice of this deed in the summer of 1845.—Daniels v. Sorrells, 9 Ala. 446; Land v. Hopkins, 7 Ala. 115; Cooper v. Galbreath, 3 Wash. 546; Sanders v. Caldwell, 1 Cowen, 662; Hamilton v. Shrewsberry, 4 Randolph, 427; Titcomb v. Maine Company, 8 Mass. 326; Wheaton v. Sexton, 4 Wheaton, 503; Jackson v. Walker, 4 Wend. 462; Lawrence v. Speed, 2 Bibb, 401; Turner v. McCrea, 1 N. & McC. 11; Osborne v. Woodson, Haywood, 24; Jones v. Fulgun, 3 Mur. 364; Minor v. Selectmen, &c., 4 Smede & Mar. 602; Ware v. Bradford, 2 Ala. 676-682; Quinn v. Wisnall, 7 Ala. 651; Mobile Press v. Magee, 9 Porter, 679.

5. The distinction should be observed, that the present is not the case of two judgment creditors, contending for money raised by the sale of an execution on a junior judgment; but a contest between the purchasers at different sales of the same land, and claiming under different titles. In a case like this, the plaintiff must recover on the strength of his own title.—Campbell v. Spence, 4 Ala. 549; Brock v. Young, 4 Ala. 584.

6. There is no statute in this State, requiring a marshal's deed to be recorded, or even a sheriff's deed. If this be so, the argument against the defendant's deed, because of non-registration, must fail. The cases in our court are as to memorandums in writing, to take a case out of the statute of fraud. Registration is quite a different thing.

7. The marshal of the southern district is the marshal of the middle district, and the land was sold in a county in which he was marshal. It is at most an irregularity.—Love v. Williams, 5 Ala. 58; Ware v. Bradford, 2 Ala. 682; Cotton Press v. Moore, 9 Por. 679.

RICE & MORGAN, *contra:*

1. The title of Huggins is void, as against the bank of Augusta, and the purchaser under its judgment, because the deed was not recorded according to the requirement of the statute, (Daniels v. Sorrells et al. 9 Ala. 436;) and the plaintiff in error can occupy no better situation than the party under whom he claims.—Nolen et al. v. The heirs of Gwynn, 16 Ala. 725.

2. The title of Chandler is void, because the marshal had no power to sell land in Tallapoosa county, and in the middle district of the State, in the city of Mobile, which is a different district.—(U. S. Stat. at Large, vol. 5, 315.) The statute of this State requires sales of land to be made at the court house door of the county in which they lie.—Clay's Dig. 205, § 17; 216, § 76. And the statute of the United States provides that all executions, and the proceedings thereon, shall conform to the requirements of the respective State laws.—4 U. S. Stat. at Large, 281, § 3. For a construction of this statute, see Amis v. Smith, 16 Peters, 303.—See also Gantly v. Ewing, 3 Howard, 707, which shows that our statute is mandatory, and the sale void.—7 Hump. 129.

3. If the sale be not void, Chandler's deed not having been recorded in due time, the judgment of the bank of Augusta acquired a lien superior to it.—Daniels v. Sorrells et al. *supra.*

4. The registration statutes apply to sheriff's deeds.—Scribner v. Lockwood, 9 Hammond, 184; 2 Nott & McCord, 105; 10 Watts, 13.

5. Sheriff's sales are within the statute of frauds; although not mentioned in *totidem verbis.* Why then, are they not within the statutes of registration, where language equally applicable to them is employed? But these statutes of registration are also statutes to prevent frauds.—Robinson v. Garth, 6 Ala. 204.

6. Judgments of the Federal Courts rendered in Alabama, are liens upon land of the defendant throughout the State.—Lessee of Sellers v. Corwin, 5 Ohio R. 398; *Doe ex dem.* Shrew v. Jones, 2 McLean's R. 78.

7. Where, in an ejectment, no other title is set up by either party than the title of a defendant in execution, under whom both parties claim, the plaintiff is not required to prove the nature or quality of the judgment debtor's title.—*Doe ex dem.*

Huntington v. Prichart, 11 Smedes & Marsh. 327; Riddle v. Murphy, 7 Serg. & Rawle, 230. And if such a question could be raised, it must be done distinctly in the primary court. It is plain that no such question was made in this case in the court below.—See also 3 Wash. C. C. 546; 1 Overt. 236; 5 Dana, 271; Brock et al. v. Young et al. 4 Ala., and cases cited in plaintiff's brief.

CHILTON, J.—This was an action of ejectment brought by the defendant in error against the plaintiff, to recover certain real estate, situate in Tallapoosa county. The presiding judge charged the jury, that if they believed the evidence, they should find for the plaintiff in the court below; so that the legal sufficiency of the proof, conceding its correctness, to entitle the plaintiff below to maintain the action, and whether if such title be shown, it is paramount to that of the defendant, are questions for our revision.

The case was tried upon an agreed state of facts substantially as follows: That the land in dispute is situated in Tallapoosa county, and was patented to one Joseph G. Lindsey, and was in Pollard's possession at the institution of this suit. The plaintiff below showed title as follows: "1. A judgment for $1620 against said Joseph G. Lindsey, rendered by the Circuit Court of the United States for the Southern District of Alabama, in favor of the Bank of Augusta, on the 23d day of December, 1840. 2. An *alias fieri facias* issued on the said judgment, the 28th December, 1846, which was levied on said land by the marshal of the Southern and Middle Districts of the State of Alabama, and a sale by said marshal, made on the first Monday in April, 1847, at the court house door in Tallapoosa county, of said land to the lessor of the plaintiff, due advertisement having been made. 3. A deed from said marshal executed to said Cocke on the day of said sale, (5th April, 1847,) which was recorded in the county of Tallapoosa on the 28th day of June, 1847."

This being the evidence of the plaintiff's title, let us examine first the question, whether it authorized him to ask the instruction from the court, that if the jury believed the evidence, he was entitled to recover.

1. It is insisted that the facts agreed upon do not show, that

Lindsey had title to the land at the time the judgment was rendered, or at any time between that and the *sale to the lessor of the plaintiff;* but does not the attitude which the parties respectively occupy as respects the title of Lindsey, dispense with proof, other than the agreement discloses? It appears that Pollard, the defendant below, claims to have derived his title through Lindsey, by sales made by the marshal *anterior* to the purchase by Cocke.—In Riddle v. Murphy, 7 Serg. & Rawle, 235, it was said by Gibson J. "both parties claim under the same title, (derived from one Cornelius Murphy) it is too clear therefore for argument, that the plaintiffs were not bound to trace back their title beyond Cornelius Murphy. If there was a title adverse to his, either in the commonwealth, or a third person, it lay on the defendant to show it."—So also in *Doe ex dem.* Huntington v. Pritchard, 11 S. & Mar. 327, it was held that in an action of ejectment, where both parties claim under purchases at sheriff's sale against the same defendant, it is not necessary that the plaintiff should make out his title to be good as against the world; if the defendant set up no title, except that of the judgment debtor, the plaintiff is not required to prove the nature or quality of the judgment debtor's title. He is entitled to recover, if he can establish that title in himself. These authorities may suffice to show, that as Pollard is in possession of the land, claiming to have derived title from Lindsey, anterior to the sale by the marshal to Cocke, this amounts to a concession of such title. "If one man," says Judge Washington, "came into possession of land by permission of another, he thereby admits the title of that other."—Lessee of Cooper v. Galbraith, 3 Wash. C. C. 549. Much more should he be considered as admitting the title when he claims to hold from him as patentee by sales made by the marshal, who could only sell a legal title by our law, of date anterior to the purchase by the plaintiff.

2. But the counsel for the defendant in error contends that the sale is void, because it appears to have been made under an *alias* execution, and that it does not appear when the former writ of *fieri facias* issued; *non constat*, it may have issued after a year and a day. Grant this, and the conclusion is erroneous; for this would be to impeach the sheriff's or marshal's deed collaterally for irregularities, the process not being void, but voida-

ble. This court has repeatedly decided that a sheriff's deed cannot be collaterally impeached for any irregularities in his proceedings, or in the process under which he sold the land, and that all that is necessary to support the title of the purchaser is a judgment, execution thereon, levy and the sheriff's deed.—Ware v. Bradford, 2 Ala. 676; Love v. Powell, 5 ib. 58; Smith v. Houston, 16 ib. 111—see also Chambers v. Stone & Pope, 9 ib. 260. The only question which can arise in this connection respects the lien of the judgment.

In Sellers & Cook v. Hayes, 17 Ala. 749, we held that where the bill of exceptions showed that the land was sold under a *pluries* execution, we were bound to presume that other executions were issued, and that in the absence of objections taken in the court below, that they were regularly issued, so as to prevent the judgment from becoming dormant. In the case before us, the record recites that the land in controversy was sold under an *alias* execution, and it does not appear that any objection was made in the court below, as to the regularity of such *alias*. It is then obvious, the two cases are entirely analogous. The case of Sellers & Cook v. Hayes, we think, correctly states the law. The term *alias* necessarily imports that a prior execution issued. To determine the time of its issue, we are driven to presumption. The defendant says, it was not issued within a year and a day, but after that time, when according to the statute the judgment will be presumed to be satisfied. On the other hand, the plaintiff says, the issue of the execution being the official act of a public officer, cannot be presumed irregular, upon the maxim, that all acts are presumed to be rightly done. The law is, that when acts are of an official nature, a presumption arises in favor of their due execution.—Broom's Legal Maxims, 427-8, and cases cited; 2 Phil. Ev., (C. & H. Notes,) 296-7, and the numerous cases there cited. Where such presumption arises, the party asserting such irregularity must prove it, as he could have done in this case, had such been the fact.

3. Having disposed of the preliminary questions raised to the sufficiency of the evidence to establish such a title as would maintain the action of the plaintiff, let us next consider the defendant's title, and ascertain whether it is paramount to that of the plaintiff. He showed a deed from Lindsey to one Huggins, dated in February, 1840, but which was never recorded in the

county of Tallapoosa until after the purchase was made by Cocke, but a copy of which was placed upon the record of deeds in Macon county, which copy Cocke saw before his purchase; also, a sheriff's deed to Pollard, who purchased under an execution against Huggins upon a judgment rendered in 1842, at a sale of said land in September, 1847. This was one chain of title. Pollard also showed a judgment rendered in the Circuit Court of the United States for the Southern District of Alabama, against said Lindsey, rendered in April, 1839; an *alias* execution on said judgment, which was levied, and a sale made by the marshal on the first Monday in March, 1844, at the court-house door of the Circuit Court of the United States at Mobile; the marshal's deed to Daniel Chandler, dated 4th March, 1844, and recorded in the same month in the county of Macon, but not in the county of Tallapoosa, until the 8th March, 1845; also a quit claim deed from said Chandler to Pollard, 31st January, 1848. It appears that Cocke saw the deed from Huggins on the record in Macon county, in January, 1842, and the deed from the marshal to Chandler in the summer of 1845. It was also admitted, that Cocke was the owner of the judgment under which he purchased at the time of its rendition, and that the suit was brought in the name of the Bank of Augusta through mistake. Such being the evidence, several questions are raised by the respective counsel as respects the relative merits of the title.

It is insisted that Cocke's title is void, because Lindsey sold to Huggins before his judgment was rendered, and this sale divested him of title, so that there was no interest or title remaining in Lindsey, upon which the judgment lien could attach. It is replied by the opposite counsel to this objection, that the deed to Huggins was not recorded until after the purchase by Cocke, nor within the time prescribed by the statute, and that the effect of this failure to register it within the six months allowed by the statute, is to postpone Huggins to the lien of the judgment rendered before such subsequent registration against Lindsey, his vendor. If the deed is not recorded within six months, nor until after a judgment is rendered against the vendor, the subsequent registration of the deed does not relate back so as to defeat the lien of the judgment, but the statute avoids the deed in favor of the judgment creditor who has no notice of such deed, either actual or constructive, at or before the rendition of such judg-

ment. A notice acquired before the sale, but after the lien attaches, cannot operate to divest the lien or affect the title of a purchaser under the judgment.—Daniels v. Sorrells, 9 Ala. 436, and cases there cited.

4. It is submitted by the counsel, whether judgments rendered in the Circuit Courts of the United States create a lien on lands in this State, co-extensive with the lien of judgments rendered in the State courts. That judgments of the latter character create a lien from the time of their rendition on land to which the defendant has a legal title situated in any portion of the State, is well settled.—Campbell v. Spence, 4 Ala. 543. The 20th chapter of the Judiciary Act passed by Congress in 1789, provides that the laws of the several States, except when the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the U. States, in cases where they apply. By the act of 1828, it is provided that the rules of proceeding, &c. shall be the same in the Circuit Courts of the United States as in the highest court of original and general jurisdiction in the State. These statutes, taken in connection with the construction placed by our own courts upon our enactments, which are held to create the lien of judgments upon real estate, most clearly give the same lien to judgments rendered in the Circuit Courts of the United States within this State, as attach to judgments of the State courts, and this point has been several times decided by the Supreme Court of the United States, as well as by the State courts.—Conard v. Atlantic Ins. Co., 1 Pet. 453; Waring v. Johnson, ib. 571; Ross v. Doe, ib. 664; *Doe ex dem.* Shrew & Winter, 2 McL. 78; Sellers v. Corwin, 2 Ohio, 398—see also, a dictum in Campbell v. Spence, 4 Ala. 543, to the same effect.

5. But it is argued that there is no statute in this State requiring marshals' or sheriffs' deeds to be recorded. The statute is general, and we see no reason for exempting them from its operation. They certainly fall as much within the mischief intended to be remedied as other absolute deeds for lands sold at public auction. Under statutes of other States requiring registration of deeds generally, they have been held to be embraced, (Massey v. Thompson, 2 N. & McC. 105; Scribner v. Lockwood, 9 Ham. 184,) and I believe they have uniformly been held to be

within the statute of frauds.—Robinson v. Garth, 6 Ala. 204, and cases cited.

6. We deem it unnecessary to consider the effect of notice by Cocke of the deed from the marshal to Chandler. The sale, by virtue of which that deed was made, took place at Mobile in the Southern District, while the land is situated in Tallapoosa county, which is in the Middle District. The act of 1828 declares, "that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, *and the proceedings thereupon, shall be the same*, except their style, in each State respectively, as are now used in the courts of such State," &c., the Federal Courts having the power to make rules so as to adapt their final process to any change which may be made by the State law, to preserve conformity.—4th vol. U. S. Stat. at Large, 281, § 3. The Supreme Court of the United States, construing this third section of the act, in Amis v. Smith, 16 Pet. 313, say, (McKinley, J.,) "we understand the phrase, "*the proceedings thereupon*," to mean the exercise of all the duties of the ministerial officers of the States prescribed by the laws of the States for the purpose of obtaining the fruits of judgments." At the time this statute was passed by Congress, and ever since, lands by the laws of this State were required to be sold on the first Monday in the month at the court-house door of the county in which they were situated.—Clay's Dig. 205, § 17; Ib. 216, § 77. The question is, can the marshal of the Southern District make a valid sale in that District of lands situated in the Middle District. We feel satisfied that he cannot. He is acting in the matter of such sale wholly without his jurisdiction, and consequently without authority. The want of authority to sell goes to destroy the deed, as much as though he had no execution, and this may be inquired of collaterally, for it is clearly distinguishable from those cases where the officer has power to make the sale, but proceeds irregularly in the execution of that power. In the latter case his deed must be set aside, if at all, by a direct proceeding; in the former, it is absolutely void.

It results from what we have said, that the instruction given by the Circuit Court to the jury was correct, and the judgment is consequently affirmed.

TURNER ADM'R. *vs.* DUPREE'S ADM'R.

1. A *scire facias* cannot revive a judgment on which no execution could ever have issued.
2. A decree of the Orphans' Court which does not designate the person or persons, in whose favor it is rendered, is void for uncertainty.

ERROR to the Orphans' Court of Madison.

A DECREE was rendered in the Orphans' Court against the administrator of Donaldson Turner, in favor of "the personal representative, or legal heirs entitled thereto (when ascertained) of Mildred Dupree, deceased." A *scire facias* issued on this judgment in the name of Mildred L. Dupree and Rebecca A. Turner, as heirs at law of said Mildred Dupree, deceased, and the judgment was revived in their names, and execution awarded. To reverse this decree, the administrator has sued out this writ of error.

ROBINSON, for plaintiff in error.

C. C. & J. W. Clay, *contra.*

PARSONS, J.—A *scire facie* to have execution upon a judgment, is only a continuation of the former suit.—2 Dunlap's Practice, 1078; 1 Term, 267-268-388. As it is the former judgment that is to be revived, and the force of which is thus to be continued by process from it, it must be a judgment from which an execution could once have issued.

The decree of the Orphans' Court was one from which no execution could ever have been issued. It does not ascertain the person or persons in whose favor the recovery was had, but the amount was to be paid to the personal representative or legal heirs entitled thereto of Mildred Dupree, deceased. This, as a decree, was void for uncertainty.—Joseph's adm'r. v. Joseph's Legatees, 5 Ala. 280. There was error therefore, in awarding the execution, and the judgment is reversed, and the cause remanded.

THE GOVERNOR, USE &c. *vs.* GEE *et als.*

1. An agent is a competent witness for his principal to prove that he has paid over money left with him by his principal for that purpose.
2. A person whose interest in the event of a suit is precisely balanced is a competent witness.

ERROR to the Circuit Court of Montgomery. Tried before the Hon. Thos. A. Walker.

A MOTION was made by the Attorney General, in the name of the Governor for the use of the State, against Gee, as the tax-collector of Sumter county, and his sureties, for a failure to pay over moneys in his hands. The defendant introduced J. C. Vandyke, as a witness, who testified that the defendant had paid the money over to him, that he had received it as Comptroller of the State, and had deposited it in the Bank at Tuskaloosa. The plaintiff objected to this witness on the ground of interest, but the court overruled the objection. This is the error assigned.

THE ATTORNEY GENERAL, for plaintiff in error.

HUNTINGTON, *contra.*

DARGAN, C. J.—In the case of Bean v. Pearsal, 12 Ala. 592, the plaintiff offered his agent to prove that he had paid over to the defendant a sum of money, which the plaintiff had left with the agent for that purpose. This court held that the testimony of the agent was admissible, on the ground of necessity, and that case is well sustained by the authorities on which it rests. In the case before us, the defendant offered his agent to prove that he had paid over to the plaintiff the money left by the defendant with him for that purpose. The same question, in principle, is presented in this case that arose in the case of Bean and Pearsal, and on the authority of that case, the judgment in this must be affirmed. But independent of the grounds of agency and necessity, I am clearly of the opinion that the witness, Vandyke, had not such an interest in this suit as would disqualify him from testifying. For if he had not paid over the money, the State could recover it of him, although it failed in

this suit; or if the judgment had been in favor of the State, and the defendant thereby been compelled to pay, he could recover of his agent upon proof of his failure to pay the money that had been deposited with him for that purpose. The interest of the witness, in my opinion, was precisely balanced, and on that ground he was competent to testify. There is no error in the judgment, and it must be affirmed.

HALL *et als. vs.* HUGGINS *et als.*

1. The purchaser of an equity of redemption, at a sale made by order of the Orphans' Court, is a necessary party to a bill which seeks a foreclosure of the mortgage.

ERROR to the Chancery Court of Mobile. Tried before the Hon. J. W. Lesesne.

THIS was a bill to foreclose a mortgage, filed by the defendants in error. One of the mortgagors had died, and his interest in the mortgaged premises had been sold by an order of the Orphans' Court. Hall, the purchaser at the sale, was made a defendant to the bill, and answered, but the complainants dismissed their bill as to him, and a decree of foreclosure and sale was rendered without him.

CAMPBELL, for plaintiffs in error.

HOPKINS, *contra:*

The general principle, that all who are interested must be joined as plaintiffs or defendants, has been much modified.—Chief. Just. Marshal says, in Elwendorf v. Taylor, 10 Wheat. 152, "that the objection" in relation to the proper parties, "does not affect the jurisdiction, but addresses itself to the policy of the court." "The rule is framed by the court itself, and is subject to its discretion. It is not like the description of parties, an inflexible rule, a failure to observe which turns a party out

of court, because it has no jurisdiction over his cause; but being introduced by the court itself, for the purposes of justice, is susceptible of modification for the promotion of these purposes."

Here, Hall had been in court through the whole cause. He had made his whole defence. The court had decreed this defence to be insufficient. At the moment of the final decree, the complainants dismiss as to him. The court sees fit to grant a decree that does not include him. Can Hansfeldt complain of this? Perhaps Hall is not concluded by the decree, although he was a party till it was made. But what if he is not? Will the Supreme Court examine into the discretion, by which it allowed the complainants to dismiss as to him, and yet decreed as to Hansfeldt, and the others.

Hall had the privilege of a defence, of contesting the bond, the mortgage, and the account. The other defendants had the aid of Hall's answers. Why should he have been also subjected to the decree? What beneficial purpose, or end of justice, could have been answered by a decree against him? Lord Eldon, in Cockburn v. Thompson, 16 Ves. Jr. 325, says, that "this rule was established for the convenient administration of justice, and it has many exceptions."

Incumbrancers either prior or subsequent, are not necessary parties to a bill to foreclose.—Cullum v. Batre, 2 Ala. 420; 6 ib. 460. But they would not be concluded.—Ib.; see Story, 178, note 2.

From the reasoning of the books, I infer that the case of Hall is one, in which the decree which the chancellor made without including him, would not be set aside as erroneous. There is a difference between a party to a bill, and a party to a decree. The reasons given in the books for making all persons who are interested in the subject, parties to the suit, are stated as reasons of propriety and convenience. These reasons are satisfied by having made Hall a party to the litigation, without having made him a party to the final decree. As,

1. "That the whole case may be seen, and the conflicting interests be brought out."—Story's Eq. Plead. p. 75. This object is here answered.

2. The owners of the equity, or "mortgagors," "are proper parties to the account."—Ib. 180. So here, Hall was a party to the taking of the account three times.

3. "Ultimately he" (part owner of the equity,) "is entitled to redeem," "as the person having the ultimate interest."—Ib. 180. Hall had notice by a litigation of seven years, during which time he might have redeemed.

4. "To prevent future litigation."—Ib. 75.

No possibility of "litigation" remains in this case, between Hall and the complainants, on the score of the account as to which no exception was pending before the Register. Nor can litigation arise between Hall and a purchaser at the sale, unless it be by distinct titles for the premises, which Hall may hereafter set up. This danger would not have been removed, if he had remained a party to the final decree. He urged no such title in his second answer. He is not in possession. He could bring ejectment on such title at all events, at any time hereafter.

PARSONS, J.—1. It is assigned as error, that the final decree was made at a time when the court was not authorized to be held by law, and without legal authority. It is, however, unnecessary to decide this question, because the decree has to be reversed upon another ground.

2. The complainants dismissed their bill as to Daniel E. Hall, and afterwards proceeded without him as a party. This we think, was erroneous.

E. S. Beebe and George W. Clark were the mortgagors; the former died, and his interest as mortgagor was sold under an order of the Orphans' Court, and Mr. Hall become the purchaser, and as such, was made a defendant and answered. Generally, to a bill to foreclose, the mortgagor is a necessary party, but not so in this case, in consequence of his death, and of the sale of his equity of redemption. But Mr. Hall, as the purchaser of this equity of redemption, was clearly a necessary party, and there could be no decree of foreclosure or of sale without him. He was a necessary party to the account, and was entitled to redeem.—Singleton v. Gayle, 8 Porter, 270; Story's Eq. Plead. § 195-196-197.

After looking into the exact state of the record, we are not satisfied that there is any other error. The decree is reversed, and as the complainants may possibly be able to show a sufficient ground for leave to make Mr. Hall a party again, we remand the cause.

CORBIN *vs.* SISTRUNK.

1. Parol evidence is admissible to show that a written instrument is altogether void, or that it never had any binding efficacy, or that the consideration has failed either in whole or in part.
2. A. executed her note to B. for future services to be rendered by him as an overseer, but before the note was delivered, told him that she could not employ him unless he brought a recommendation from C. B. promised to procure the recommendation, but failed to do so, and the services were never rendered. B. brought suit on the note, and proved that he had been ready to enter upon the service at the time agreed on, and that A. then refused to employ him. *It was held,*
   1st. That the procuring of C.'s recommendation formed part of the consideration of the note, and having failed to procure it, B. could not recover on the note.
   2d. That parol evidence was admissible to prove what was said about the recommendation before the delivery of the note.

ERROR to the Circuit Court of Macon. Tried before the Hon. E. Pickens.

SEABORN WILLIAMS, for plaintiff in error:

1. The parol testimony was inadmissible, because it wholly destroyed the legal effect of the writing, in the view taken by the court; and secondly, a contract cannot be partly in writing and partly by parol. If the parol testimony did not destroy the effect of the writing, it completely changed its legal effect. The parol testimony established a new contract, if any thing, and this without a sufficient consideration, and in this view the testimony was not admissible, nor the charge of the court correct.

2. It is improper for the court to say to the jury, that if a witness said a particular thing, it established a certain point. If the charge could be allowed in any form, it should be left to the jury to say whether or not this parol request on the one part, and the reply on the other part, was intended as a new contract, or a new stipulation of the old contract.

The view taken by the judge presiding was, that the writing was delivered as an *escrow*. An *escrow* can never exist in a case like the present.—Powell v. Jones, 12 Smedes & M. 506; Holt v. Moore, 5 Ala. 521; Stone v. Buckner, 12 Smedes & M. 82; Merrill v. Smith, 12 Ala. 569; Hair et al. v. La Brouse, 10

ib. 548; Paysant v. Ware et al., 1 ib. 160; Mead v. Steger, 5 Por. 498; Litchfield v. Falconer, 2 ib. 28; Jackson v. Cotton, 2 Johns. 258; 4 Kent's Com. 454-5; 1 Black. Com. 306; Shep. Touch., vol. 1, 57-8; Hurls. on Bonds, 8; 3 McCord, 245; 1 Johnson's Cases, 125.

Clopton & Ligon, *contra:*

1. The written instrument read in evidence by plaintiff, does not purport on its face to set forth the whole contract between the parties; it purports to contain only what the defendant had obligated herself to do. All of the contract on the part of the plaintiff rests in parol—instance, the written instrument is entirely silent as regards the time when the services were to commence and how long they were to continue, &c. In like manner no portion of the contract to be performed by the plaintiff was reduced to writing. Hence parol evidence is admissible to show what was his part of the contract.—Potter v. Hopkins, 25 Wend. 419; Tisdale v. Harris, 20 Pick. 12; C. & H. Notes, 1471-73.

2. Parol evidence is admissible to prove that the written contract was not to be binding upon defendant, except upon the happening of a certain event.—Bibb, Judge, &c. v. Reid & Hoyt, 3 Ala. 90; Barlow v. Fleming, 6 ib. 146; C. & H. Notes, 1450-53; Honeycut, use &c. v. Strother, 2 Ala. 139; Murchie v. Cook & McNab, 1 ib. 42; Simonton v. Steele, 11 ib. 358; Morrison v. Morrison, 6 Watts & Serg. 517.

3. It is competent to prove by parol a subsequent agreement, modifying, restraining or discharging a written contract; and it matters not how soon the subsequent agreement was made after the execution of the written contract. Parol evidence then is admissible to show that by a subsequent agreement, made after the written contract was executed and before it was delivered, defendant should be released from the written contract, unless plaintiff brought a recommendation from Crymes; and the delivery of the written contract was sufficient consideration to sustain the subsequent agreement.—C. & H. Notes, 1477; Brewster v. Countryman, 12 Wend. 449; Richardson v. Hooper, 13 Pick. 449.

CHILTON, J.—Assumpsit upon a writing executed by the defendant in error to the plaintiff, as follows: "I, Susannah Sistrunk, do oblige myself to pay to Jerome B. Corbin, for his ser-

vices for overseeing, the sum of two hundred and fifty dollars in money, and two milch cows, also five acres of land to be ploughed when necessary." This writing was attested by Daniel M. Perry as a subscribing witness, who was examined upon the trial, and testified that the writing was executed in the latter part of the year 1849, and that the services stipulated for were to commence the 1st Jan. 1850, and to continue for that year; that after Mrs. Sistrunk had signed the writing, and the witness had placed his signature to it, and when she was in the act of passing it to Corbin, but before it was delivered, she said to Corbin that unless he brought a recommendation from Dr. Crymes she could not employ him, to which the said Corbin replied, that unless he did bring such recommendation she need not hire him. It appeared that nothing had been previously said between the parties as to Crymes' recommendation. The plaintiff objected to the testimony of Perry, but the court overruled the objection, and the plaintiff excepted.

It was also made to appear, that the plaintiff was ready and willing to enter upon the service contracted for at the time agreed upon, but did not produce the recommendation of Dr. Crymes, who, as the proof conduced to show, refused to recommend him; but Mrs. Sistrunk refused to hire him, and without calling for the production of such recommendation, told him she had employed another person.

The court charged the jury, that if they believed from the evidence that after the writing was signed by the defendant, and whilst she was in the act of delivering the same to the plaintiff, she said that unless the plaintiff brought a recommendation from Dr. Crymes she could not receive him as overseer, and that this was assented to by the plaintiff, the writing would not bind the defendant until the recommendation of Dr. Crymes was produced by the plaintiff, and if that had not been produced, the plaintiff could not recover. To this charge the plaintiff likewise excepted.

There is a marked difference between parol evidence which goes to vary, contradict or add to written agreements which intelligibly speak the intention of the parties, and which they have adopted as furnishing evidence and full expression of their intention, or which changes the legal effect of such agreements, and parol proof which shows that the instrument is alto-

gether *void*, or that it never had any binding efficacy, or the want of consideration, either in whole or in part. While the first is inadmissible, the latter is constantly received.—1 Greenl. E.,§ 284. In the case before us, the defendant gave her note, thus executing the contract upon her part, and the writing evidences the terms of the contract, so far as to be performed by her, but the contract on the part of the plaintiff was altogether executory. He was to produce the recommendation of his former employer, (Crymes,) and serve as overseer for the year 1850. This constituted the consideration for the note sued on, and if he failed to perform his part of the contract, the plaintiff could not require a performance on the part of the defendant. The undertaking to obtain the recommendation from Dr. Crymes was a condition agreed upon as precedent to his entering upon the service. It formed the first and a substantial part of the consideration, without which, or a waiver of it on the part of the defendant, the whole consideration failed, and the contract became inoperative. The record presents no question as based upon a waiver of the recommendation, and as the plaintiff failed to procure it, we are very sure that Mrs. Sistrunk had the right to treat the contract as at an end, and to reject the plaintiff as overseer. The proof that Crymes refused his recommendation, and that consequently the plaintiff was unable to produce it, coupled with the fact that its production was to precede the service, and that such service was never rendered, goes to the entire consideration of the contract. The admission of the evidence of Perry, and the charge of the court as based upon the proof set out in the bill of exceptions, were entirely correct—see upon this point, Murchie v. Cook & McNair, 1 Ala. 41; Simonton v. Steele, ib. 357; Honeycut, use &c. v. Strother, 2 ib. 135; Barlow v. Fleming, 6 ib. 146; 3 Phil. Ev., (C. & H. Notes,) 1473; Ib. 1450-53.

This case is distingushable from Long against Davis, at the present term, where we held that the charge of the court which gave to a parol agreement made contemporaneously with the writing, the force of changing the legal effect of the writing, was erroneous.

Let the judgment be affirmed.

BROWN *vs.* HIGGINBOTTOM, USE, &c.

1. An execution which is issued by a Justice of the Peace, after the lapse of ten years from the issuance of the last previous execution, is not sufficiently regular to authorize a sale of the land on which it may be levied for want of personal property.

ERROR to the Circuit Court of Tuskaloosa. Tried before the Hon. Geo. D. Shortridge.

P. & J. L. MARTIN, for plaintiff in error, cited—Clay's Dig. 206, § 28; ib. 207, § 31; Taylor v. Acre, 8 Ala. 491; Wilson v. Collins, 9 Ala. 127; Van Cleave v. Haworth, 5 Ala. 188; Shackleford v. Miller, 18 Ala. 675.

E. W. PECK, *contra:*

1. The bill of exceptions shows no error that can be noticed by this court, because both the objections named in the bill of exceptions are general objections merely for supposed irregularities in the proceedings before the justice of the peace, without pointing out and showing in what the supposed irregularities consisted. The court below, therefore, was not bound to notice the said objections, and properly overruled them.

2. If the objections consist in any supposed variance between the warrant and the judgment entry, and executions, as to the names of the parties, it is sufficient to say, that advantage could not be taken of that, on a motion for an order to sell the land levied on; such an irregularity could only have been reached by an appeal, or on *certiorari*. The supposed variance would at most make the judgment erroneous, and subject to be reversed, but not void; the execution was, therefore, rightfully issued and levied, and if so, the order to sell was properly made.

DARGAN, C. J.—Several objections have been taken to the regularity of the proceeding before the justice of peace, and to the propriety of the order of the Circuit Court, directing the land to be sold; but we shall take notice of only one of them. It appears that the first execution was issued on the 25th of January, 1840, which was never returned. The second was issued on the 25th of March, 1850, which, for want of personal pro-

perty, was levied on land as the property of the defendants, and upon this levy the order of sale was granted. The act under which this order was made provides, "that when it shall become necessary for the want of personal property, to levy an execution issued by a justice of the peace on land, it shall be the duty of the officer levying such execution, to return the same to the next Circuit Court of his county, and such court shall on the motion of the plaintiff, and it appearing by an exhibition of the proceedings before the justice, that the same have been regular, order a sale of such land, or whatever part thereof may be necessary to satisfy such execution."—Clay's Dig. 207. Was this execution sufficiently regular to authorize the order of sale? We think if an execution is issued contrary to law, that it cannot be regular, within the meaning of this act.

It is true that an execution issued upon a judgment after a year and a day, is not void, but voidable only, and if not avoided by the defendant, and his property is sold under it, the purchaser will acquire a good title. But we do not think that it was intended by this act, to allow the lands of a defendant to be sold under an execution, which ought not to have issued by the justice; therefore it is that the court is required before ordering the sale, to *inspect the proceedings*, and if they are not *regular*, the order cannot be granted. If the execution is shown to have been issued improperly, and not in conformity to law, a sale of the lands should not be ordered, without entering into the inquiry, whether the writ was void, or voidable merely. This we hold to be the true construction of this act; and hence, the question is whether the execution issued on the 25th of March, 1850, was issued in conformity to *law*. By the law of this State, if an execution has been issued on any judgment or decree within a year and a day, and the same has not been returned satisfied, another may be issued within ten years thereafter, and the presumption of the payment of the judgment does not arise until ten years have elapsed, during which no execution has been issued. But if ten years have elapsed, during which no execution has issued, or if no execution at all has been issued within the year and day from the rendition of the judgment, then the common law presumption of payment arises, and afterwards an execution cannot lawfully issue without reviving the judgment by *scire facias*. This is the construction put upon the statute of 1835, in the case of Van Cleave v. Haworth, 5 Ala. 179,

which was examined and re-affirmed in the case of Shackelford v. Miller, at the present term. Looking then to the executions, and the judgment on which they were issued, we must hold that the execution issued in March, 1850, was not sufficiently *regular* within the meaning of the act; for more than ten years had elapsed between the issuance of the first and second executions. The second could not therefore legally issue, and the court erred in ordering a sale of the lands levied on by it. The judgment must therefore be reversed, and the cause will be remanded, if the defendant in error wishes it.

ARMSTRONG *et al. vs.* PUGH.

1. The liability of the sureties of a county officer does not cease upon their application to the County Judge to require a new bond from the officer, but continues until the new bond is given, or until the office is declared vacant on account of the officer's failure to give it.

ERROR to the Circuit Court of Pike.

F. S. JACKSON, for plaintiff in error.

BUFORD, *contra.*

DARGAN, C. J.—This was a motion against Wiley S. Armstrong, and his securities upon his official bond as clerk of the County Court of Pike, to recover a sum of money collected by him as clerk upon a judgment rendered in said County Court, in favor of the plaintiff, against John Lindsey. The securities pleaded, that Wilkinson, one of them, thirty days before the liability of their principal accrued, gave notice to the judge of the County Court of said county, to cause Armstrong, the clerk, to renew his official bond. To this plea the plaintiff demurred, and the demurrer was sustained by the court.

It is made the duty of the respective county judges, whenever application is made to them by a security of any clerk, sheriff, or other county officer, to issue a citation to

such officer, to appear before them on some day named therein, not less than ten, nor more than fifteen, and renew his bond, with good and sufficient securities, for the faithful performance of the duties of his office. And upon the execution of such new bond, the security or securities making the application, shall be discharged from the obligation of the bond previously entered into by them. But such discharge will not relieve them from the liabilities which had been incurred before that time.—Clay's Dig. 534, § 13-14. Under this statute, it is clear that the liability of a security must continue until the officer gives the new bond in accordance with the order of the County Court, or until the office shall be declared vacant for a failure to do so, which may be done under the 15th section of the same act. That *a security makes application* to the judge of the County Court does not discharge him, but his liability continues for the official acts of the officer, until the new bond is given. The security perhaps can compel the county judge to issue the citation by *mandamus*, and his refusal may give the security making the application a cause of action against him; these however, are not questions before us. The only question is, whether the application of a security to the county judge to require a new bond from the officer, will discharge him from liability for the subsequent defaults of the officer. It is certain that it will not; consequently, the demurrer was properly sustained.

Let the judgment be affirmed.

COSTER *vs.* BRACK, Adm'r.

1. When the defendant, instead of demurring to a replication, takes issue upon it, he cannot test its legal sufficiency by a motion to exclude evidence, which tends to establish it.
2. When an administrator acquires real estate by pnrchase from the heirs of his intestate, it cannot be regarded in a court of law as assets in his hands.

Error to the Circuit Court of Montgomery. Tried before the Hon. R. Dougherty.

Assumpsit by Coster against Brack, as administrator of Gains Brack, deceased, to recover the amount of a promissory note, executed by the intestate to said Coster. The defendant pleaded, among other things, that the estate had been declared insolvent by a decree of the Orphans' Court, to which the plaintiff replied, that after the decree of insolvency, the defendant had received other assets of the estate, which were more than sufficient to pay all the debts of the intestate. On the trial the plaintiff offered to prove, that the intestate had died, seized and possessed of a certain house and lot in the city of Montgomery, which had not been sold under the decree of the Orphans' Court, and that it, together with the personal property of the estate, was more than sufficient to pay all debts; that the defendant had acquired the house and lot by purchase from the heirs of the intestate, (the purchase money being an amount which had been certified in his favor by the Orphans' Court, on final settlement,) and that he had afterwards sold it, and had not accounted for the proceeds of the sale. This evidence was excluded by the court, on the motion of the defendant, to which the plaintiff excepted, and which he now assigns as error.

MARTIN & BALDWIN, for plaintiff in error.

MAYES, *contra.*

CHILTON, J.—In Edwards v. Gibbs, Judge, &c., 11 Ala. 292, it was held, that the effect of the decree of insolvency was to transfer to the Orphans' Court the *exclusive jurisdiction* of all claims against the estate, and in that court, it may be shown on final settlement, that the administrator has withheld or wasted the assets. With this decision we are satisfied, and it shows that the replication of the plaintiff to the plea of insolvency, that assets came to the hands of the administrator after the decree of insolvency, sufficient to pay all the debts, as also the similar replication to the fourth plea, was bad, and would doubtless have been so held upon demurrer; but the defendant failed to demur, and took issue, and if the rejected proof tended to establish this issue, it could not properly have been excluded upon the ground of the insufficiency of the replication. The defendant having treated it as sufficient, could not in this indirect way call in question its legal sufficiency.

The effort in the case before us was, to prove that the intes-

tate died seized of real estate of value sufficient to pay all th debts due from his estate, and that the administrator instead o applying for an order to sell the same, purchased it of the heir: in consideration of a balance certified in his favor by the Orphans' Court on final settlement.

It is true, that the statute declares, that the lands, tenements, and hereditaments of a testator or intestate, shall stand chargeable with all the debts of the deceased, over and above what the personal estate shall be sufficient to pay, &c., saving to the widow her dower in all cases.—Clay's Dig. 191, § 1. But lands can only be considered assets *sub modo*. Upon the death of the intestate, the title if in him is devolved upon his heirs, and the statutes prescribe the mode by which they may be subjected to the payment of the debts in case of the insolvency of the estate. Clay's Dig. 224 *et seq.*; until the requisite steps are taken to subject the lands, until in other words, they are turned into assets by a sale under the statute, the title remains in the heirs, and not in the administator.

If he acquire the title by a purchase from the heirs, such purchase is outside of his administration, and while he would be chargeable with the rents and profits, and might be held as a trustee in equity of the legal title for the benefit of the unpaid creditors, the land thus situated could not be regarded in a court of law, as assets in his hands. Whether he could be sued as upon a *devastavit*, under the statute, which declares that an administrator, who fails to apply for leave to sell the real estate within three months from the time of reporting the estate insolvent, shall be guilty of a *devastavit*, and may be sued upon his bond, together with his securities, is a question not presented by this record.—Clay's Dig. 197, § 27.

We think it very clear, from an examination of the statutes, that before lands can be made assets for the payment of debts in the hands of an administrator, the Orphans' Court must have ordered a sale of them, or some steps known to the law for divesting the title of the heirs must have been taken. As nothing of the kind was done in the case before us, it follows that the evidence offered of the seizin of the ancestor, and the purchase of the land by the administrator, did not tend to prove that such land was assets in the administrator's hands, and was properly rejected.

Let the judgment be affirmed.

DARGAN, C. J., not sitting.

WOODWARD *vs.* WOOD.

1. The general rule that an objection for want of proper parties defendants must be taken by demurrer, plea or answer, and cannot be raised for the first time at the hearing, applies only to those cases in which a decree may be rendered and relief granted in conformity to the prayer of the bill, without the probability of injury to the rights of those who are not made parties.
2. All the mortgagees in whom is vested the legal title, are necessary parties to a bill to redeem, filed by the assignee of the equity of redemption.
3. When a special authority is vested in one or more of the mortgagees for the benefit of all, all have an interest in the exercise of that authority, and a decree cannot be rendered affecting their interest unless they are all made parties to the bill.
4. If the mortgagee is only a trustee for another, the *cestui que trust* is a necessary party to a bill to redeem, unless some special reason is shown why he may be dispensed with.
5. When the principal debtor executes a mortgage to secure his sureties on a debt due to the Bank, the Bank is a necessary party to a bill to redeem filed by the assignee of the equity of redemption, unless the bill alleges that the debt has been paid.

ERROR to the Chancery Court of Talladega. Tried before the Hon. W. W. Mason.

IT is shown by the bill that Willis Wood was indebted to the Branch Bank at Montgomery by two promissory notes, one for three hundred and seventy-five dollars, due June, 1840, and the other for two hundred and seven dollars, due in June, 1839; and that Henry G. Woodward, Matthew Wood and John Casey were his securities for the payment of them. For the purpose of protecting his securities against loss, the said Willis Wood, on the 4th day of April, 1840, conveyed the land described in the pleadings to them by way of mortgage, and authorized either Henry G. Woodward or Mathew Wood to sell it after the 10th day of May next thereafter, if the said Willis should fail to pay said notes. The deed also provides, that if the debts should be extended, and the securities, or either of them, should continue bound, that the deed should continue in force as a security for their protection. It is further shown, that Matthew Wood has become the purchaser of all the title and interest left in Willis

Wood, after the execution of the mortgage. It also alleged, that the notes payable in Bank were extended by Willis Wood as principal, and Henry G. Woodward and Greene Mitchell as securities, and after the extension of said notes, that Willis Wood paid to Henry G. Woodward the amount of his indebtedness to the Bank, and that he undertook and promised to pay the Bank debt and discharge the mortgage. The bill, however, prays an account, and the complainant offers to pay any balance to the said Woodward, that may be ascertained to be due to him; it also prays for an injunction to enjoin the said Woodward from selling said land, and that the mortgage be decreed to be satisfied. The answer of Woodward admits the execution of the mortgage, and the extension of the debts, as alleged in the bill, but denies that Willis Wood in his life-time paid to him the amount of the debt due to the Bank, or that he agreed to release the mortgage. But the chancellor conceiving that the testimony established the allegations of the bill, granted the relief prayed, without a reference to the master to ascertain how much had been paid to Woodward, or whether anything was due to him or not. To reverse this decree, Woodward prosecutes a writ of error to this court.

WOODWARD, for plaintiff in error.

RICE & MORGAN, *contra.*

DARGAN, C. J.—We can consider this bill in no other light than as one to redeem, filed by the assignee of the equity of redemption; and the first question made by the assignment of errors is, whether the complainant has brought before the court all persons whom it was necessary to make parties defendants. The complainant, however, insists that the objection for the want of parties was neither taken by demurrer, plea or answer, and therefore it should not be allowed, even if the bill was defective in this respect. The general rule is, that a defect for the want of parties defendants must be taken advantage of either by demurrer or plea, or it should be insisted upon in the answer.—Story Eq. Pl., § 541; 1 Dan. Ch. Pr. 334. And if the objection be not taken in one of these modes, the court may proceed to a final decree, unless the rights of the absent parties would be thereby affected. But in some cases the defect is fatal to the

character of the bill, or to the relief sought by it, and the Court could not proceed to a final hearing and render a decree in conformity with the prayer of the bill, even if the defendant brought before the court made no objection to the want of proper parties.—Story Eq. Pl. § 236. In England, there is a rule adopted upon the subject, which authorizes the court to make a decree saving the rights of absent defendants, if the court shall see fit, when the objection is not taken either by plea or demurrer, or by the answer.—Dan. Ch. Pr. 338. But even under this rule, the court will not proceed to a final decree if the rights of those not made parties can be affected thereby.—Dan. Ch. Pr. 339, and authorities there cited. It is then only in those cases where relief may be granted without the probability of injury to the absent defendants, that the court will proceed to a final decree without making all persons interested parties defendants, unless the failure or omission to do so is justified by some special reason. Even under these general rules, we think the court erred in proceeding to a final decree. By the deeds of mortgage, the legal title to the land was vested in the securities, Henry G. Woodward, Matthew Wood and John Casey, and before the party complainant can obtain a decree to redeem, he should bring before the court all the mortgagees in whom is vested the legal title.—Story Eq. Pl. § 188. But if a special authority is vested in one or more of the mortgagees for the benefit of the whole, then it is apparent that they all have an interest in the exercise of this authority, and a decree taking it away must affect the interest of all, and therefore all must be made parties, or the bill will be so defective that the court should not proceed to a final decree, notwithstanding the objection was not taken until the hearing; and if it does, the decree may be reversed by appeal or by writ of error. Again, if the mortgagee be but a trustee for another, the *cestui que trust* should be brought before the court as a defendant, unless some special reason be shown why it is not necessary. Under this rule we think the Branch Bank at Montgomery should have been made a party defendant, for although the mortgage was intended to protect the securities, yet the debt was due to the Bank, and consequently they were but trustees in equity for the benefit of the Bank, or rather trustees to pay the debt, whether that was due to the Bank or to any one else. Thus it is a principle of equity that

if A and B be bound for a debt to C, A as principal, and B as security, and A give B a mortgage to secure him, C, the creditor of both, may resort to the mortgage for the satisfaction of his debt.—McMahon vs. Fawcett et al. 2 Rand. § 514, and cases there cited. Now the bill as framed does not show that the debt due to the Bank has been paid, and to render the Bank an unnecessary party, that should be alleged. From the fact that the Branch Bank at Montgomery is a necessary party, it follows that Mitchell should also be made a party. He is but the security of Willis Wood, and therefore interested in taking the accounts, and may resort to all the securities for his indemnity, that the Bank has from the principal debtor for the payment of the debt. To supersede the necessity of making the Bank or Mitchell parties, some reason should have been alleged in the bill; but none is, and the court erred in proceeding to a final decree without them. Without, therefore, examining any other question, we must reverse the decree of the chancellor and remand the cause, that the bill may be amended if the complainant sees fit to do so; for as the bill now stands, not only Casey, one of the mortgagees, but the Branch Bank at Montgomery and Mitchell, are all necessary parties as defendants.

Let the decree be reversed, and the cause remanded.

CHILTON, J., not sitting.

SMITH *et al. vs.* WILEY.

When the endorsement on a writ states that the suit is founded on a refunding bond given to the plaintiff as administrator, while the writ is in the name of the plaintiff individually, and the declaration agrees with the writ, there is not such a variance between the endorsement and the declaration, as will authorize the court to reject the latter.

ERROR to the Circuit Court of Perry.

THIS was an action of debt instituted by Wiley against the

plaintiffs in error. The endorsement on the writ states that the action was founded on a bond executed by the defendants to the plaintiff, for the sum of $40,000, conditioned, that if the said Joseph W. Smith as guardian of John S. Smith, had received of the plaintiff, as administrator of Robert Smith, deceased, more than the distributive share of said John S. Smith, then they would refund the overplus; and that the object of the suit was to recover an overplus so paid. The suit was brought in the name of Wiley individually, and the declaration pursued the writ.

I. W. Garrott, for plaintiffs in error:

1. A refunding bond is a bond given by a distributee to an administrator of an estate, conditioned to pay back to such administrator his portion of any debt or demand that may afterwards come against such estate. It is given for money belonging to the estate, and not to the administrator, which the administrator pays over to the distributee, and takes his bond that it shall be paid back on the happening of the contingency provided against by the bond. The bond consequently, is the property of the estate, and not of the administrator. If the administrator dies, resigns, or is removed, then the refunding bond goes to his successor; and after the estate is finally settled, the bond still remains good for the protection of the distributees or legatees severally, in the event that a creditor should succeed in making good a claim against them as such distributees or legatees after a final settlement. It is, therefore, contended that a refunding bond is an asset of the estate of Robert Smith, and that Wiley could not maintain an action on it in his own name. If he can sue upon it in his own name, then he can convert it to his own use.—Dunham v. Grant, 12 Ala. 105; Barron v. Vandvert, 13 Ala. 232.

2. When one is summoned as a garnishee in his individual capacity, and answers indebtedness as executor, no judgment can be rendered against him.—Ex'r. of Tillinghast v. Johnson, 5 Ala. 514. The executor could not consequently sue for, and recover in his individual capacity, on such cause of action.

John, for defendant:

1. There is no variance between the cause of action and the first declaration filed. The amended declaration embodies lit-

erally the cause of action as endorsed on the writ, and consequently there could be no variance; therefore, the non-suit was erroneous.—Wharton v. Franks, 9 Por. 232; Sexton v. Roane, 7 Ala. 829; Exparte Ryan, 9 Ala. 89; Tenison v. Martin, 13 Ala. 21; The State Bank v. Johnson and Jeffries, 9 Ala. 367; 1 Chitty's Pleadings, 250-251-252-253.

2. But if there had been a variance, the court should have allowed the plaintiff to amend his endorsement on the writ as proposed.—Wharton v. Franks, 9 Por. 232.

3. The facts did not authorize the court to dismiss the case. Hunt, use, &c. v. Stewart, 7 Ala. 525.

The question as to the sufficiency of the declaration cannot be presented on this record. The only question is, as to filing the declaration. But should the other questions suggested be considered, then the first count in the declaration, or first declaration counting on the penalty without assigning breaches, is good.—Governor, use, &c. v. Wiley, et al. 14 Ala. 172.

But the second declaration or count is good, if the first be not, for the breaches are assigned, and whether well assigned or not, must be tested by demurrer, and not by motion to strike from the file.

The reason assigned for striking from the file, and refusing leave to file the amended declaration, and for the refusal to allow the proposed amendment of the endorsement on the writ, was that the plaintiff could not sue in his individual capacity on a refunding bond, taken by him for money as administrator. But this position is clearly wrong, because refunding bonds are not assets, and because the plaintiff has ceased to be administrator, and therefore could not sue as administrator.—Dunham v. Grant, 12 Ala. 105.

But if this position were untenable, and it were true that the bond sued on was payable to the plaintiff as administrator, he could sue in his own name individually, and even if the money, when collected, would be assets in his hands. If there had been a final settlement, and he had been charged with the amount, he could collect the amount.—Hall v. Chenault, 13 Ala. 710.

Refunding bonds are intended for the benefit of the administrator individually, and he may sue for his own benefit, either before or after final settlement of the estate.—Clay's Dig. p. 196, § 23-24.

CHILTON, J.—The only question for our consideration is, whether there was such a want of conformity between the writ and declaration, as to justify the court in rejecting the latter. It was said in Sexton v. Roane, 7 Ala. 830, that the design of the Legislature, in requiring the cause of action to be endorsed upon the writ, was to apprise the defendant of the matter in controversy, so that he might not be taken on surprise, &c.—We think there could have been no surprise in this case. The suit by the plaintiff below was brought in his individual capacity, and the writ and declaration agree as to the character in which he sues. The cause of action as endorsed on the writ substantially agrees with that described in the count; at all events, there is not such a radical departure or variance, as under our decisions, authorized the court to reject the declaration. See Tenison v. Martin, 13 Ala. 27, and cases cited. Whether the bond declared on is not assets of the estate of Smith, is a question which cannot be presented in this way, and one which we do not now decide.

The judgment of the Circuit Court, reversing the judgment of the County Court, must be affirmed.

PECK & CLARK *vs.* WALLACE & LEWIS.

1. When a person places a note in the hands of an attorney for collection, and takes from him a receipt for it in his own name, but does not claim it as his own, nor any lien upon it, and the note itself is payable to a third person, and not endorsed, a payment by the attorney of the proceeds of the note to the payee will discharge him from all liability to the person who placed the note in his hands.

ERROR to the Circuit Court of Tuskaloosa. Tried before the Hon. John D. Phelan.

E. W. PECK, for plaintiffs in error:

The only question made on this record is, was the money at the time it was paid, lawfully paid by the plaintiffs in error, to Boyd, the payee of the note?

The question is not decided against the plaintiffs in error, by holding that they were the agents of the defendants in error by receiving the note of them. This is undoubtedly true in one sense, but were they not also the agents of Boyd to whom the note was made payable?

The note being payable to Boyd, and not endorsed, suit upon it must have been brought in his name; and without authority for that purpose, the suit could not rightfully have been brought for the use of the defendants in error, thereby subjecting them to a liability for the costs.

Again, if the plaintiffs in error had refused to pay the money to Boyd, the payee, on demand, could not he have recovered it by suit? Would it have been any defence to such an action for them to have proved the simple fact, that they had received the note from the defendants in error? If that fact alone would not have defeated such an action, then the judgment in this case on the evidence should have been for the plaintiffs in error, for the only evidence of the rights of the defendants in error, is the receipt, which proves merely that the note was received from them.

If Boyd could have recovered the money of the plaintiffs in error, because the note was payable to him, and because the money was collected in his name, there being no evidence that the note had been assigned, (and there is no evidence whatever of that fact,) then I ask, was it not lawful for them to pay him the money without suit?

This is a case in which the plaintiffs in error might well have paid the money either to the defendants in error, or to Boyd, whichever made the first demand; to the defendants in error, because the note was received from them; to Boyd, because the note was payable to him, and collected in his name, there being no evidence that he had assigned it to the defendants in error.—Williams v. Willington, 1 H. Blackstone's R. 85, end of Lord Loughborough's opinion.

2. As to the practice on a demurrer to evidence, I refer the court to 2nd vol. Dunlap's Practice, and the cases there cited. The language employed in some of the cases reported and referred to on the defendant's brief is too strong, not warranted by principle or adjudged cases. To say that a court will lean against a party, is a reproach to the court.

Contra, referred to Peck & Clark v. Wallace & Lewis, 10 Ala. 146; 12 ib. 768; Gazzum, Herd & Wragg v. Bank of Mobile, 1 Ala. 268; Edmonds v. Edmonds, ib. 401; Pharr & Beck v. Bachelor, 3 Ala. 242; Carson v. State Bank, 4 Ala. 148; Dearing, Smith & Co. v. Smith & Wright, ib. 432; Foster v. McDonald, 15 Ala. 376.

PARSONS, J.—This case was here on two former occasions.—10 Ala. 146; 12 ib. 768. But it was here on those occasions upon facts that do not appear in it now. It does not now appear that Boyd, the payee, ever endorsed the note; nor is there any evidence, except what the plaintiffs below introduced, and to that the defendants below demurred, and the court, upon the demurrer to the evidence, gave judgment against the defendants below, who are now the plaintiffs in error. To give the plaintiffs below the benefit of every fact, which their evidence conduced to prove, the question is, whether they made out a cause of action against the defendants. Their evidence proved, or conduced to prove a promissory note, payable to the order of Boyd; that this note by their agents had been put into the hands of the defendants below for collection, who gave their receipt for the collection to the plaintiffs below; that the plaintiffs below, after the money had been collected by the defendants, caused it to be demanded of the latter, who failed to pay it, however, because they had already paid it to Boyd, which was before this suit was brought. Now, if it be conceded, that either the plaintiffs below, or Boyd, might have maintained an action against the defendants for the money collected, it would follow, that the latter might have made payment to either, and the payment would discharge them. The note was payable to Boyd, and the suit for its collection, if any, must have been in his name. There was clear legal evidence, therefore, of his legal title and right to the money. If the defendants below had refused to pay the money to Boyd, on his demand, he could have brought suit against them, and showing a clear legal right to the money, must have recovered. Against his legal right which appeared upon the face of the note, there was no evidence, save the fact that Wallace and Lewis had possession of the note, and put it out for collection, taking a receipt for that purpose, in which however, there is no promise to pay the money to them, but it shows the legal rights of

Boyd expressly. Every part of the evidence was introduced by the plaintiffs below. Their possession as some evidence of property, is entirely overcome by the evidence that accompanied it, of legal title in Boyd. Upon this state of facts, if the plaintiffs below had received the money from the defendants, Boyd could have recovered it from them. If there had been any evidence that the plaintiffs below had any interest in, or lien upon the note or its proceeds, and more especially, if the defendants had been notified of that fact, the case would have stood upon different grounds.

As to the evidence by which it appeared that the defendants had paid the money to Boyd, it consisted of their own declaration; but the plaintiff below, in proving their declaration or admission of another fact, proved that also, and made no objection to it; nor was it in any manner contradicted or discredited. It was part of the entire statement made by the defendants below, which was proved by the plaintiff, and is therefore evidence,—(1 Greenl. on Ev. § 201;) more especially, as the plaintiffs below permitted it to go as evidence in the court below, having proved it themselves. In taking this evidence under the circumstances, by which the plaintiff below is concluded on a demurrer to his evidence, we are going, as I think, to the very verge of the law, but not beyond it. The judgment is reversed, and according to the settled practice of this court, the cause is remanded.

BRANCH BANK AT DECATUR *vs.* MOSELEY.

1. When the bill of exceptions states that "the defendant then read a transcript in the words and figures following," but the transcript is not set out, and the clerk certifies that it is not on file in his office, a transcript which is afterwards sent up on *certiorari*, and which cannot be identified by any reference to it in the original record, must be rejected as forming no part of the bill of exceptions.

ERROR to the Circuit Court of Morgan.

Robinson, for plaintiff in error.

Clay, *contra.*

CHILTON, J.—A motion is made in this case to file the transcript of the record of proceedings had in the Madison Circuit Court, upon an attachment at the suit of A. W. & E. S. McMahan against James Gibson, and of a case growing out of such attachment, involving the trial of the right of property in favor of the same plaintiffs against one Thomas M. Graves, claimant, which transcript has been returned by the clerk of the Circuit Court of Morgan to this court, in answer to a *certiorari*, and which it is insisted by the defendant in error, should constitute a part of the bill of exceptions, but was omitted to be inserted by the clerk. The only reference made to any transcript by the bill of exceptions is in these words: "Defendants then read a transcript of a record of the Circuit Court of Madison, in the words and figures following." The clerk then proceeds to certify that the transcript alluded to was not on file.

It was early decided in this court, that "whenever it is intended to incorporate in the bill of exceptions a paper read, or which was offered to be read, it is indispensable to set out a copy in the bill of exceptions before the same is sealed, or so to describe the paper by its date, amount, parties, or other identifying features, as to leave no room for mistakes in the transcribing officer."—Looney v. Bush, Min. 413. We think this decision correctly states the rule, and that less strictness might lead to much uncertainty in the records of this court. Our conclusion is, that the transcript of the record now offered to supply the defect in the bill of exceptions, not being identified in any way, as to parties, dates, amount, or by any other descriptive feature in the record originally returned, must be rejected, as forming no part of the bill of exceptions.

Parsons, J. not sitting.

HAIR & LABUZAN *vs.* LOWE.

1. To entitle a party to relief in equity against a judgment at law, when his defence could have been made in the court of law, he must show *first*, that his failure to make a defence was not attributable to his own omission, neglect or default; and, *secondly*, that he has a good defence to the entire cause of action, or to such part of it as he proposes by his bill to litigate.
2. When a garnishee comes into a court of chancery to be relieved against a judgment at law, which has been rendered against him by default, he should show by his bill, not only that he is not indebted to the defendant in attachment, but also that he has no effects in his hands belonging to said defendant.
3. When a judgment has been rendered by default against a garnishee, and the evidence clearly shows that the failure to defend at law is attributable to his own neglect, he cannot be relieved in equity against the judgment.

ERROR to the Chancery Court of Sumter. Tried before the Hon. J. W. Lesesne.

R. H. SMITH, for plaintiffs in error.

HUNTINGTON, *contra.*

DARGAN, C. J.—To entitle a party to relief against a judgment at law, when his defence could have been made in a court of law, he must show two things—first, that his failure to make defence was not attributable to his omission, neglect or default; and secondly, that his defence is good to the entire cause of action, or such part of it as he proposes by his bill to litigate. It is not enough, on the one hand, to show that the judgment is inequitable merely, but it must be further shown that the failure to defend at law was *unmixed* with the mere neglect of the party seeking relief from a court of chancery. So, on the other hand, it is not enough to show that he was not guilty of neglect, in suffering the judgment to go by default, but he must go further, and clearly show that it is inequitable and unjust to permit the judgment to be enforced. He must show that injustice has been done by the judgment at law, and this, without any fault or neglect on his part.—Kincaid vs. Cunningham, 2 Mun. 1; Blount vs. Gaven, 3 Hay. 88; 2 Story Eq. §§ 887,

888. Applying this test to the bill in the case before us, we think that it does not show a proper case for the interposition of a court of chancery. It is shown that an attachment was issued at the suit of Howard Labuzan against the estate of James M. McDade, and the complainant was summoned as a garnishee, who failing to answer, a judgment *nisi* was rendered against him, on which a *sci. fa.* was issued, and being returned executed, and complainant showing no cause against it, the conditional judgment was made final. It is also alleged that the complainant was not indebted to McDade at the time of issuing the attachment, nor had he become indebted to him since that time. The law, however, requires that a garnishee should answer, not only as to his indebtedness, but also what effects he had in his possession belonging to the defendant, at the time of the service of the writ. The plaintiff in the attachment has a right to a discovery from the garnishee, not only as to his actual indebtedness, but also whether he had not in his possession goods or effects belonging to the defendant; and we think that when a garnishee comes into a court of chancery to be relieved from a judgment at law which has been rendered by default, he should show by his bill not only that he is *not* actually indebted, but that he has not any effects in his possession belonging to the defendant in attachment. He may not be actually indebted to him, and yet have effects in his possession that would render him liable, or would take away all injustice from the judgment rendered against him. The bill does not show that the complainant had no effects in his possession belonging to McDade, and therefore it fails clearly to show that it would be inequitable and unjust to enforce the judgment against him.

Independent of this view, however, and admitting that the reason shown in the bill why he did not defend himself at law is sufficient to entitle him to come into a court of equity, yet the evidence clearly shows that the failure to defend at law can be attributed to nothing else than his own neglect. This precludes him from the aid of a court of equity, for it was not only incumbent on him to allege a sufficient ground to satisfy the chancellor in interposing in his behalf, but it was also incumbent on him to prove it. This he has failed to do. The consequence is, that the bill should have been dismissed, and we must therefore reverse the decree and here dismiss the bill.

GRANT *vs.* KENNEDY.

1. A *supersedeas* to restrain the execution of a writ of *habere facias possessionem* cannot be granted in vacation on the petition of a stranger to the judgment.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

THIS was a petition by the plaintiff in error to the judge of the sixth judicial circuit, for a *supersedeas* to restrain the execution of writ of *habere facias possessionem*, which had issued on a judgment to which she was not a party. The petition alleged that she claimed title to the premises, but did not set out her title. It also alleged that she had no notice of the pendency of the suit in which the judgment was rendered on which the writ of possession issued, and that her title was in no wise connected with that of the defendant in that suit. The judge granted the order for the *supersedeas* in vacation, and the petition was afterwards dismissed on the demurrer of the plaintiffs in the judgment.

PHILLIPS, for plaintiff in error:

Judgment in ejectment is binding only on the parties thereto and their privies, and under a judgment by default against the casual ejector, a person in possession, a stranger to the action, cannot be ousted.—Howard & Holman v. Kennedy's Ex'rs., 4 Ala. 592. And where one who is not bound by a judgment is ousted by a *habere facias possessionem*, a writ of restitution is the proper remedy.—Ib.

The case was taken from the docket in 1842, and did not appear again until 1848. This was a discontinuance, which would have rendered the judgment erroneous even against the parties on the record, and if so, the court would not permit an execution to operate against a stranger to the action.—Kennon v. Bell, Ala. 98.

STEWART, *contra:*

The petition and *supersedeas* were properly dismissed. There was no proceeding before the court which the plaintiff was called

on to answer or defend against. The petition had done its office; it was not a pleading to which the plaintiff could plead. No motion was made, and no proof produced, either at the first or second term. There was no other course than to dismiss the petition. The petition itself contains no merits. It does not set out petitioner's title; she admits that she came into possession long after the suit was brought, and that Auld was in possession at the commencement of the suit. She cannot claim the benefit of any irregularities in the proceedings against Auld, unless she had a right to defend. As to who may be admitted to defend, see Adams on Ejectment 254, and the American notes and cases there referred to. The petitioner alleges that her claim and possession are totally disconnected from that of Auld. No one can be admitted to defend under any circumstances, whose title is disconnected from, or inconsistent with that of the tenant in possession.—1 Bibb 128; 1 Green 66; 5 Mun. 539; 1 Caines' R. 151.

PARSONS, J.—After the petition had been in court more than a year, during which time the petitioner made no motion in relation to it, the court, on inspection of the record of the cause in which the writ of possession issued, and of the petition itself, dismissed the petition. The record of that cause is not before us. It is true the case came before the court on a demurrer to the petition, but the court looked into the record of the cause, and the matters and things stated in the petition, and dismissed it. This the court might have done without the demurrer. The petitioner states no particular title in herself, and the other allegations of her petition are insufficient. The case of Hall v. Hilliard, (6 Ala. 43,) is against her, and it is unnecessary to add any thing to what is there said.

Let the judgment be affirmed.

LAMKIN *et al. vs.* HEYER, *et al.*

1. A decree of the Orphans' Court against an administrator, in favor of the distributees, is conclusive on him and his securities, and it cannot be impeached on the ground that the parties in whose favor the decree was rendered, are not distributees.

ERROR to the Probate Court of Lowndes.

STONE & JUDGE, for plaintiffs in error:

1. "By the 3rd section of the bankrupt act of 1841, not only the property in possession, but actions pending, and mere rights of action, of every one who is regularly declared a bankrupt, vest, *eo instanti*, in the assignee appointed for that purpose."—(Butler and Wife v. Insurance Company, 8 Ala. 146; Reavis v. Garner, et al. 12 Ala. 661.)

2. Therefore, one who has been regularly declared a bankrupt, cannot institute and maintain a suit in his own name, on a cause of action due him at the time of the declaration of bankruptcy. And even if a suit be commenced previous to the bankruptcy of the plaintiff, the subsequent declaration of his bankruptcy disables him from the further prosecution of the suit.—(Lacey et al v. Rocket, 11 Ala. 1002; Brooks & Wilson v. Harris, 12 Ala. 555.)

3. The record shows that E. P. & H. Heyer were bankrupts at the date of the rendition of the decree in their favor in the Orphans' Court, and had been regularly declared such. They were then not entitled to said decree; but Lamkin, the administrator, not having raised the objection, the decree is conclusive as against him.

4. But the sureties of Lamkin, (the Hinkles) not having been parties to the settlement, nor even *quasi* parties, could not at the settlement have shown the bankruptcy of the Heyers. Had they been present at the settlement, not having been parties, they would not, and could not have been heard to raise this objection.

5. The sureties then, when they are proceeded against in the summary mode provided by statute, have the right to make this defence; and the appropriate mode of making it is by *supersedeas*, or motion to quash the execution, as to them.—

(Thompson v. Bondurant & King, 15 Ala. 346; Little, et al. v. Heard, *et ux.* 16 Ala. 358.)

The sureties have this right, otherwise the statute authorizing such summary and *ex parte* proceedings against them is unconstitutional and void. (Upon this point see concluding part of Judge Ormond's opinion in Anderson v. Rhae, 7 Ala. 106 and 107.)

They have the right, because "no security for an executor or administrator shall be chargeable beyond the assets of the testator or intestate, on account of any omission or mistake in pleading, of the executor or administrator."—(Clay's Dig. 228, § 34.) The recovery in this case in the name of the Heyers, would be no bar to a recovery of the same debt by the rightful owner; and if the sureties are compelled to pay this decree, and are hereafter compelled to pay the same debt to the rightful owner, they will not only be chargeable twice for the same demand, but they will also be "chargeable beyond the assets of the intestate," for the omission to plead of their principal.

They have this right, because they are bound only for the faithful performance of the duties which the law requires of the administrator. One of his duties is, to pay debts to creditors. It is no part of his obligation to pay them to strangers.—Clay's Dig. 221, § 3.

6. But to entitle the Heyers to an execution against the Hinkles, they must show that they have obtained a valid decree against Lamkin, and that a valid execution has been issued thereon, and returned no property found.—(Little et al v. Knox, adm'r. 15 Ala. 576.) On our motion in the Probate Court, the *onus* being upon the Heyers to show the valid decree, and the valid execution against Lamkin, and they not having shown these things, the court erred in dismissing our motion, and turning us out of court.—(See Little & Knox, *supra*, and Little *et al.* v. Heard, *et ux.* 16 Ala. 358.)

7. But the record shows affirmatively, that there was no valid decree against Lamkin; and consequently, that no valid execution could have been issued against him, so as to bind his sureties. A regularly declared bankrupt, as to all debts, &c. due him previous to his bankruptcy, is *civiliter mortuus;* and this court has decided that "an execution issued on a judgment after the death of the plaintiff is void."—(Stewart v. Nuckols, 15 Ala.

225.) In this case, the execution was issued not only after the civil death of the plaintiffs, but they were civilly dead at the date of the rendition of the decree in their favor; which makes this a stronger case than that of Stewart v. Nuckols, *supra.*

8. There was no valid decree against Lamkin, because "it is a legal *axiom*, that to authorize a court to adjust the rights of parties, and to render an operative judgment between them, there must be what is sometimes called, in technical language, an *actor* and a *reus ;* or in other words, a controversy conducted by a plaintiff, and a defendant, having an actual existence, no matter by what names they are known."—(See opinion of Collier, C. J. in Stewart v. Nuckols, 15 Ala. 231.) Hence, this court has decided that a judgment recovered against a dead man is a nullity."—(Hood, et al. v. Bank at Mobile, 9 Ala. 335.)

The case of Powell v. Washington & Brock, in 15 Ala. 803, is not in conflict with the law as above stated, because in that case, John Morgan, a party *in esse*, was a party plaintiff with Washington, the dead man. And no second recovery could be had on the cause of action in that case, because the plaintiff really in interest, being a party to the record, and recovering for his use, could never have a second recovery.

GILCHRIST, *contra:*

1. A judgment being the solemn adjudication of a court having competent jurisdiction of the subject matters in a cause, it is of so high a nature, that it can only be questioned by writ of error, petition for a new trial, or by application to a Court of Chancery when the direct object is to set it aside, for fraud, &c.—Swift's Evidence, p. 9-10; 1 Day's R. p. 170. Indeed, this is a general rule, the only exception being when the judgment or other proceeding is *coram non judice*, or actually void.

2. A judgment is conclusive upon *parties and privies*, in a suit of matters at issue, or which may have been put in issue. The plea of the bankruptcy of the Heyers could have been pleaded at the administration settlement.—1 Chit. Plead. p. 25 and note.—Lacy, Terrell & Co. v. Rockett, 11 Ala. 1002. By pleading one plea, defendant admits all pleas inferior to it—(1 Chit. Plead. 474; 2 Saunders Plead. & Ev. 132;) and by not pleading at all, he admits plaintiff's right to sue, and is conclud-

ed.—Powell v. Washington & Brock, 15 Ala. 803; a case in point and decisive of the one at bar.

3. But the judgment is conclusive, and cannot be impeached. Crawford v. The Adm'rs. of Siminton, 7 Port. 110; Garner v. French, ib. 549; Cullum v. Casey & Co. 1 Ala. 551; Lee & Norton v. The Insurance Bank of Columbus, *et als.* 2 Ala. 21; Williamson v. Howell, *et al.* 4 Ala. 693; McClure v. Colclough, 5 ib. 55; 15 ib. 803; Perkins v. Moore, Judge, &c. 16 ib. 17; Wyman, *et al.* v. Campbell *et al.* 6 Port. 219; 1 Greenl. on Ev. 590-596 and note. Some of the above cases were determined in chancery, but they are more than persuasive to show the binding effects of judgments at law.

4. The judgment being clearly conclusive against Lamkin, the administrator, is clearly binding on his sureties as shown by some of the above cases, and particularly Perkins v. Moore, Judge &c. 16 Ala. 9; Williams v. Howell, 4 Ala. 693; Townsend & Gordon v. Everett, 4 Ala. 607.

5. But there is a judgment against the securities on the return of execution, "*nulla bona*," against the administrator; execution issued against his securities under the statute, and was returned, no objection being made, nor is it contended that there was any irregularity. This proceeding being authorized by the statute, and there being no irregularity, no advantage can be taken by the securities. No improper use has been attempted by the execution.—Williamson v. Howell, *et al.* 4 Ala. 693.

6. Had the plea of bankruptcy of the Heyers been put in by the administrators or creditors at the final settlement, we could have replied that the debt subsequently came to our hands; this would have been a good replication.—Birch v. Tillotson, 16 Ala. 387.

7. In Powell v. Washington & Brock, 15 Ala. 803, suit was brought in the name of Powell, use, &c. Powell was dead before suit was brought. The matter of plaintiff's death before the suit brought, could have been pleaded in bar, (Jenks v. Edwards, use, &c. 6 Ala. 144.) This defence, however, was not resorted to in the case of Powell v. Washington & Brock, and there was judgment *nil dicit*. The court say "is it permissible for the security of Washington in the *supersedeas bond*, to say there was a valid defence, of which my principal might, but did not avail himself. The defence goes merely to the ca-

pacity of one of the parties to sue. That capacity was admitted by failing to object to it on the trial." This case is identical in principle with the one at bar, and is conclusive of it.

The writ of *supersedeas* is allowed in cases, as a substitute for the *audita querela*, being a more summary remedy; it is governed by the same law. The *audita querela* would not lie in the case made.—§ 1 Bacon Ab. 510.

DARGAN, C. J.—The question presented for our revision arises in this manner: In August, 1847, a decree was rendered against John B. Lamkin, as administrator of George Clark, in favor of E. P. & H. Heyer, for six hundred and five dollars 62-100, as their distributive share and portion of said Clark's estate. Execution was issued shortly thereafter against Lamkin, which was returned no property, and afterwards an execution was issued against Lamkin and his securities on his official bond. A motion was made by the defendants in this execution to quash it, and also to annul the decree, on the ground that E. P. & H. Heyer had been in the year 1842, before the rendition of said decree, declared bankrupts, and all their rights had vested thereby in William C. H. Waddell, the assignee in bankruptcy. These motions were refused by the court.

It may not be improper to observe, that it is somewhat questionable whether this court should reverse the action of the court of probate, as no exception was taken to the judgment of the court, notwithstanding the facts were admitted by the parties, and the question of law raised in the form of a demurrur to them. But inasmuch as the parties do not raise that objection, we will proceed to the merits of the case.

No principle of law can be better settled than this, that a judgment rendered by a court of competent jurisdiction is conclusive upon the rights of the parties as to all matters that were, or could have been properly litigated in that suit. The authorities referred to by the defendants' counsel fully establish this rule, if, indeed, authorities were necessary to prove it. If this were not so, there would be no end of litigation, and the recovery of a judgment upon one trial would only become the beginning of another suit or contest in reference to the same subject matter. The administrator could have controverted the rights of the Heyers, as distributees, on the final settlement. This he

did not do, and his failure is conclusive alike on him and his securities. This question cannot be litigated again in the Orphans' Court, for the decree against Lamkin and the execution issued thereon, which was returned no property, are made to operate as a decree against his securities. This decree cannot be impeached *unless for fraud*. It cannot be on the ground that the parties in whose favor the decree was rendered, are not distributees. This would be to upset the entire settlement, for the mere purpose of contesting a fact that could have been tried at the final settlement.

In the case of Williamson v. Howell, 4 Ala. 693, it is said that the sureties of an administrator are concluded by a settlement of their principal in the Orphans' Court, unless there be fraud. To the same effect is the case of Townsend & Gordon v. Everett, Ib. 607; and see also Slatter and wife v. Glover, 14 Ala. 648.

The bankruptcy of the Heyers being the only ground alleged why the execution should be quashed, the motion made for that purpose was properly overruled, and the judgment must be affirmed.

STRICKLAND *vs.* NANCE.

1. One who is in the possession of land before the rendition of a judgment under which it is afterwards sold, may protect himself against the purchaser at the sheriff's sale, by showing his own possession and an unregistered deed executed by the judgment debtor prior to the rendition of the judgment, although he does not connect himself in any manner with the deed, or show that he claims under it.

ERROR to the Circuit Court of Dallas. Tried before the Hon. Geo. Goldthwaite.

G. W. GAYLE, for plaintiff in error:

1. If Strickland, after his purchase, had gotten peaceable possession of the land, the defendant, Nance, could not have re-

covered against his *documentary* title. Then why defeat an action upon the same facts? The rule should work both ways.—See Hallett v. Eslava, 2 Stew. 115.

2. A sheriff's deed is conclusive, except for fraud in its execution.—Love & Williams v. Powell, 5 Ala. 58.

3. If it were shown that Boswell ever had *actual possession* after his purchase from White, the case might likely be affirmed on the authority of Powell v. Allred, 11 Ala. 318. But all the reasoning of that case is in favor of reversal, when actual possession had not been taken by the vendee of the unregistered deed. The bill of exceptions is silent on that subject, but it is true that there was no proof of it, and I respectfully suggest that the doctrine of Mallory v. Stodder, 6 Ala., 801, that "a bill of exceptions must always be taken most strongly against the party excepting, for the reason that it is supposed to be prepared by his counsel," is false in practice, and ought to be overruled. This doctrine allows of great fraud upon the excepting party, for it is the experience of every practicing lawyer, that before a bill of exceptions is complete, it is made the work of the judge, and the party who gains the case below. The doctrine should be that "a bill of exceptions shall be construed most strongly against the party who gains the case below, because he and the judge generally make up the bill of exceptions." But there was no proof of Boswell's actual possession, and the question arises, how could the possession of a "squatter" be notice to plaintiff of title in Boswell? Suppose, before sale, plaintiff had gone to Nance and inquired after the owner, could Nance have given information? Boswell's deed was never recorded; he was never in possession from 1827 up to trial, and Nance would have been as ignorant as the purchaser.—See Powell v. Allred, 11 Ala. 318; Scroggins v. McDougal, 8 Ala. 381; Daniel v. Sorrell, 9 Ala. 436; King v. Crocheron, 14 Ala. 822.

4. White being a non-resident, Gayle, his attorney, was liable for costs under our statute, and consequently directed the levy. Nance cannot complain, because he was a squatter, and upon return of execution "no property," against White, he would have also been liable for costs.—See Clay's Dig. 316 § 23.

Lapsley & Hunter, *contra:*

1. It was clearly competent for the defendant to protect his

possession by an outstanding title in another.—Adams on Ej., 32 and 33; Avent v. Read, 2 Por. R. 480, and other cases in our reports.

2. The deed from patentee to Boswell, together with the possession in the defendant, did make out a complete outstanding title, as completely as if due record of the deed had been proved. —Morgan v. Morgan, 3 Stew. R. 383.

3. It may be said that the possession should have been by Boswell, to whom the deed was made. Not so. The reason of the rule is "that the possession should put every person upon inquiry as to the title." Any actual possession existing when a man buys is sufficient to put him upon that inquiry, and when once put upon the inquiry, he is chargeable with full knowledge of the state of the title.

4. But independent of the defence of outstanding title, the plaintiff's title was destroyed by proving the patentee's deed and possession of defendant existing when the plaintiff purchased it at sheriff's sale under an execution against the patentee. Such a purchaser can only recover when he shows that the defendant in execution had the actual possession or the legal title at the time of the sheriff's sale. It was therefore wholly immaterial whether the defendant had any title.—Brock v. Younge, 4 Ala. 584.

DARGAN, C. J.—This was an action of trespass to try titles to a tract of land described in the declaration. To make out his title the plaintiff showed that the land had been granted by the government of the United States to Thomas White, in the year 1825. He further showed a judgment against White, rendered in the year 1849, on which an execution issued, and had been levied on the land in question. He also showed a sale and a deed from the sheriff. The defendant introduced a deed from Thomas White to William Boswell, dated in 1827, and proved its execution, but this d ed never was recorded. He also proved that he had been in the quiet possession of the land for several years previous to the rendition of the judgment under which the land was sold, and had continued in the possession up to the trial. The court charged the jury, that if they believed the deed from White to Boswell was duly executed, and that the defendant was in possession of the land pre-

vious to the rendition of the judgment, and had continued in possession up to the time of trial, the plaintiff could not recover.

It may be remarked that the evidence does not show in what manner the defendant held the land, or how he obtained possession; whether he claims under Boswell, or not, we are not informed. To my mind it is difficult to perceive how this possession can supersede the necessity of the registration of the deed. But in the case of Powell v. Allred, 11 Ala. 318, this court held, that the mere naked possession of one prior to the rendition of the judgment under which the land was sold, was sufficient notice of an unregistered deed, although the party in possession did not in any manner connect himself with the deed, or show that he claimed under it. Before we can reverse this judgment, we must overrule this decision, which is directly in point. But as it is one involving the construction of our registry acts, and affecting titles to property, we think it best to adhere to it, although we may not be satisfied with the reasoning on which it is placed.

Let the judgment be affirmed.

MOORE *vs.* FIQUETT.

1. When a writ is returned into court, executed by the proper officer, although it was not executed five days before the sitting of the court; yet if the defendant makes no objection to its execution in the primary court, he cannot raise the objection in the appellate court.

ERROR to the Circuit Court of Tuskaloosa.

No counsel for the plaintiff in error.

E. W. PECK, for defendant.

CHILTON, J.—The error assigned is, that there is a judgment by default, when it appears that the writ was "not served

upon the defendant below five days before the commencement of the court, to which it was made returnable." The statute declares that "all original process, and all subsequent process thereupon, to bring any person or persons to answer to any action, suit, bill or plaint, in any court in this State (except *subpænas* for witnesses, which in term time may be made returnable immediately) shall be issued by the clerk of such court, and shall be returnable to the first day of the term, and shall be executed at least five days before the return thereof; and if any person shall take out any writ or process while such court is sitting, or within five days before the beginning of the term, such writ or process shall be made returnable to the term next after that then held, or to be held within five days as aforesaid, and not otherwise; and all writs and process issued, made returnable, or executed in any other manner, or at any other time than is herein before directed, may be abated on the plea of the defendant."

We have very carefully looked into the cases which have arisen under the above statute, and we feel constrained to hold that we should violate both its letter and spirit, were we to allow a party to take advantage of the irregularities there pointed out, in this court, without having raised any objection to the process, or its execution in the primary court. Whether he should raise the objection by plea in abatement, or by motion to set aside the service for irregularity, it is not necessary for us now to determine. All we decide is, that when the writ is returned into court, executed by the proper officer on the party, although it was not executed five days before the sitting of the court, yet, if the defendant makes no objection in the primary court, he cannot be allowed for the first time in this court to raise such objection. The following cases seem to require that irregularities in the execution of process should be taken advantage of by plea in abatement.—Roberts v. Beeson, 4 Port. 167; Nabors v. Thomason, 1 Ala. 590; Mitchell v. Allen, 2 S. & P. 247; and see this statute construed in Findley v. Richie, 8 Port. 452.

Judgment affirmed.

JORDAN *vs.* BREWIN & BOGGAN.

1. In an action by a physician to recover for medical services rendered, if the defendant wishes to require proof of his license to practice, he should notify the plaintiff two days before the trial, that his license or authority to practice will be required *on the trial of the cause.*

ERROR to the Circuit Court of Marion. Tried before the Hon. Samuel Chapman.

This was an action instituted by the defendants in error against the plaintiff, to recover the amount of a promissory note which he had executed to them for medical services rendered.

COGGIN, for plaintiff in error.

PECK, *contra.*

DARGAN, C. J.—All promises to pay money in consideration of medical services are void by the laws of this State, unless made to a physician who is authorized to practice according to the provisions of our statutes.—Clay's Dig. 487. But in an action brought to recover for medical services, the physician need not produce his license or authority to practice, unless he has been notified by the defendant two days before the trial, that such proof will be required. If no such notice has been given him, he can recover without introducing any evidence of his license or authority to practice.—Clay's Dig. 491.

We do not think that the notice given to the plaintiffs was sufficient. It requires them to "attend at the town of Pikeville, on the first Monday in October, 1849, to show cause for practicing medicine in this State, and to charge for their services," and also informs them that the defendant will then and there demand their authority for so doing. But the notice does not inform the plaintiffs why their authority to practice would be required on that day, and they were not bound to regard it. The plaintiffs should have been notified "to produce their license or authority to practice medicine upon the trial of this cause;" they then would have known the reason why it was required, and if they failed to prove their authority, they would have failed in the action. But as the notice did not inform them that

their license would be required on the trial of the cause, it was insufficient, and the plaintiffs were not bound to prove their license or authority to practice.

Let the judgment be affirmed.

ENIS *vs.* ROSS.

1. A *certiorari* to review the judgment of a justice of the peace cannot be regularly sued out after the expiration of three years from the rendition of the judgment.

ERROR to the Circuit Court of Fayette.

PECK, for plaintiff in error.

DARGAN, C. J.—On the 31st of August, 1844, a judgment was rendered in favor of the plaintiff against the defendant, by a justice of the peace. In 1848, a *certiorari* was applied for and obtained by the defendant, returnable to the County Court, and by agreement between the parties, the cause was transferred from the County to the Circuit Court. The plaintiff moved the Circuit Court to dismiss the *certiorari* and the *supersedeas* that had been issued thereon, but his motion was overruled, and the plaintiff declining to proceed further in the trial of the cause, judgment was rendered against him for costs. In the case of Mason & Chambers v. Moore & Tulane, 12 Ala. 578, this court held, that a *certiorari* to review a judgment rendered by a justice of the peace could not be regularly granted after three years from the time of the rendition of such judgment. With this decision we are entirely satisfied, and hold that the lapse of three years is a bar to a writ of *certiorari*, the object of which is to bring before an appellate tribunal the judgment of a justice of the peace.

The Circuit Court therefore erred in refusing to dismiss the *certiorari* on the motion of the plaintiff, and the judgment is therefore reversed, and the writ here dismissed.

FALK & ROSENTHAL *vs.* REESE, USE, &c.

1. When a cause has been transferred to the Circuit Court, under the act of February 11, 1850, (Pamphlet Acts, p. 34,) after the appearance term of the County Court, it is not erroneous to enter judgment by default at the first succeeding term of the Circuit Court.

ERROR to the Circuit Court of Lauderdale. Tried before the Hon. S. C. Posey.

W. COOPER, for plaintiffs in error.

R. W. WALKER, *contra.*

DARGAN, C. J.—This was an action of debt commenced in the County Court of Lauderdale, against the defendants, on a promissory note made by them, payable to the plaintiff. The writ was returnable to the January term of said Court to be held on the fourth Monday of January, 1850. The cause was afterwards transferred to the Circuit Court of said county, in pursuance of the act passed the 11th of February, A. D. 1850, and on the fourth day of the next term of the Circuit Court, which was held on the first Monday in April, 1850, a judgment final was rendered against the defendants by default. The rendition of this judgment by default at that term of the court is now assigned as error. We do not think that the April term of the Circuit Court should be considered the appearance term of the cause. The writ was returnable to the January term of the County Court. This was the appearance term, and when the cause was transferred under the statute to the Circuit Court, it stood for trial at the next term thereof; consequently it was entirely regular to take a judgment by default at that term. Some objections have been made to the declaration, but we consider it substantially good.

Let the judgment be affirmed.

CLEMENTS *vs.* CRIBBS & COVINGTON.

1. Pleas must be construed separately and distinctly, except when connected by a reference to each other, and the plaintiff on the trial of an issue on one plea cannot take advantage of an averment or admission contained in another plea.

ERROR to the Circuit Court of Tuskaloosa. Tried before the Hon. Geo. D. Shortridge.

THIS was an action of trespass brought by Clements against Cribbs & Covington, to recover damages for taking away and converting certain goods, wares and merchandize, alleged to be the property of the plaintiff. The defendants' pleas, which were demurred to, are stated in the opinion of the court.

ORMOND & PECK for plaintiff in error:

1. The demurrer to the second plea should have been sustained, as it plainly appears that the goods levied on as the property of J. C. Clements, were the identical goods which had already been attached as the property of Reuben Clements, and replevied by him. They were then in the custody of the law, and not subject to attachment in another suit.—Augustin v. McLean, 3 Por. 138; Rives & Owen v. Wilburn, 6 Ala. 45; Hagan v. Lucas, 10 Pet. 400.

No counsel for defendants.

PARSONS, J.—The plaintiff demurred to the two special pleas of the defendant Cribbs, and the demurrers were overruled, and that is now assigned as error. In reference to those pleas it is contended, that the demurrers to them should have been sustained, because it appears, as is contended, that the goods levied on as the property of J. C. Clements were the identical goods which had already been attached as the property of Reuben Clements, and replevied by him—that those goods were therefore in the custody of the law, and not subject to attachment in another suit. But the fact, I think, does not appear, so as to enable the plaintiff to rely on it in support of either of his demurrers. It certainly is not stated in either one of the pleas.

The first special plea of Cribbs states that, as sheriff, he took the identical goods which are mentioned in the declaration, under an attachment in his hands against Reuben Clements, the plaintiff, and that they were replevied by him. The second special plea states that, as sheriff, he took the identical goods mentioned in the declaration, under an attachment in his hands against J. C. Clements, stating also, in substance, that they were the property of J. C. Clements, but held by Reuben Clements for the purpose of defrauding the creditors of J. C. Clements. The other levy is not stated, however, in that plea, nor is it stated that they had been replevied. The pleas have no reference to each other. As they are drawn, as well as in legal effect, they are entirely distinct. The counsel cannot possibly make the fact appear upon which he relies, without making one plea destroy the other. In the case of Pope v. Welsh, decided at this term, we went fully into this doctrine, and held, upon authority, that pleas were distinct things, except when they were connected by a reference—that one could not be taken advantage of to help, or to vitiate another, any more than if they were on different records, and that a plaintiff could not prove his case on one issue, by what the defendant admits in his plea on another issue in the same action. It may be that the fact on which the counsel relies can be collected, with more or less certainty, from all that is stated in the two pleas and the declaration, taken together, but it cannot be made out from what is stated or admitted in either one of the pleas, and therefore the case of Pope v. Welsh is against the plaintiff in error. In other respects, we think the pleas are substantially good.

The judgment is affirmed.

ARRINGTON *vs.* HAIR, Adm'r.

1. When a plaintiff styles himself executor or administrator, and declares on a note payable to himself in that capacity, but the declaration does not aver that the note is assets of the estate, the words executor, &c., are a mere *descriptio personæ*, and on the death of the plaintiff the suit is properly revived in the name of his personal representative.

Error to the Circuit Court of Sumter. Tried before the Hon. Samuel Chapman.

Hill & Hale, for plaintiff in error:

1. The plaintiff in error insists that there is error in the record in this, that the said James Hair revived a suit and took a judgment in his own name as the administrator of John S. Arrington, who was executor of Henry Arrington, whereby the proceeds of the judgment would appear to be assets of the estate of said John S., when the record plainly shows that the proceeds of the said judgment ought to be assets of the estate of said Henry, and that the suit which had abated by the death of said John S., executor, should have been revived by an administrator *de bonis non cum testamento annexo* of the estate of said Henry. In support of the error thus assigned, they cite the following authorities: 1 Blk. Com., book 2, chap. 32, p. 506; Lomax on Ex'rs., vol. 1, book 3, chap. 3, p. 74; ib. vol. 1, book 5, chap. 3, p. 148; Williams on Ex'rs., vol. 1, p. 283; Saunders' P. & E. 3d Am. Ed. (Phil. 1837,) top p. 496, side p. 497; Saunders' Rep., 3d Am Ed. p. 223, note 72, m. (f) left hand column; Wentworth's Office of an Executor, Am. Ed. 467, 468; Farrell v. Jacobs, 4 Mass. 634; Partridge v. Courts, 5 Price 412.

R. H. Smith, *contra*.

1. This suit was originally brought by John S. Arrington, styling himself executor of Henry Arrington, deceased. The declaration shows a promise by defendant to John Arrington, without any allegation that the action accrued to him as executor. The breach is that Robert Arrington did not pay the plaintiff, &c.

2. This was a suit, then, by John Arrington, in his own right, and the addition of "executor," &c., was mere *descriptio personæ*, and the suit was properly revived in the name of the plaintiff's personal representative.—Warren, Ex'r. v. Rist, 16 Ala. 686; Johnson v. Gaines, 8 ib. 791; King & Clarke v. Griffin, 6 ib. 387. These authorities also establish that the suit was properly brought.

3. In Chitty's Pl. (10 American, from 6 London ed.) the principles governing this case are thus laid down: "An executor may sue as such upon a contract made with him in that character, and in other cases when the sum to be recovered would be assets; and in these cases the cause of action should be stated to have accrued, and the promise to have been made to him as executor," and on page 51, (marginal) "he is not bound to declare in that capacity on a contract made with him, but may sue in his individual right."

CHILTON, J.—The declaration in this case does not aver that the note sued on was of the assets of the estate of Henry Arrington, but describes the plaintiff as his executor, and counts on a note payable to the plaintiff by that description. We have frequently ruled that styling himself executor or administrator in the suit, or being so styled in the note, is but a description of the person, and this being the case, it follows that suit was properly revived in the name of the administrator of the plaintiff, who died after suit was brought. If the note was assets, the defendant should have shown it.—Peters v. Heydenfeldt, 3 Ala. 205; Oliver v. Hearne & Whitman, 4 ib. 271; Adm'rs of Weatherford v. James, 8 Por. R. 171; McEldery & Chapman v. McKenzie, 2 Ala. 33; Williams v. Hinkle *et al.* 15 ib. 718–719; Godbold v. Meggison, 16 ib. 142–143; Harbin v. Levi, 6 ib. 401, and cases cited; Warren v. Rist, 16 ib. 686; Johnson v. Gaines, 8 ib. 779; 6 ib. 387.

Judgment affirmed.

SMELSER *vs.* DRANE.

1. Parol evidence is inadmissible to prove an execution, unless its loss or destruction is first proved, or its absence accounted for, or a transcript of the record containing it produced.

ERROR to the Circuit Court of Lawrence. Tried before the Hon. S. C. Posey.

THOS. M. PETERS, for plaintiff in error:

1. When the plaintiff, in such actions as this, rests his title upon a sheriff's or marshal's deed, he must show as a proper foundation of his title, a judgment, execution thereon, a levy and the sheriff's or marshal's deed.—Ware v. Bradford, 2 Ala. 676; Wheaton v. Sexton, 4 Wheat, 503.

2. The court below ought therefore to have sustained the defendant's objection to parol evidence of the existence of the execution under which the marshal sold the land in controversy. The execution having been returned, it became thence forward a part of the record, and its production or a copy thereof certified to the court and jury, in some authorized and authentic form, was necessary to show its existence. This fact could not be shown by parol.—Woodward v. Harbin, 1 Ala. 104; Lawson v. Orear, 4 Ala. 156; Ansley v. Carlos, 9 Ala. 973; Brown v. Isbell, 11 Ala. 1009; Smith v. McGehee, 14 Ala. 404.

3. If the execution was lost after its return or before, (which is not pretended,) being an original paper in the cause, or a part of the record, it was competent to perfect the record by supplying or substituting the lost paper, and then procuring a properly exemplified copy of the record thus supplied. In any event the parol evidence was inadmissible.—Lyon v. Poling, et al. 14 Ala. 753; and authorities there cited, p. 759; Doswell et al. v. Stewart, 11 Ala. 629.

4. Even after the admission of illegal testimony, the court is bound to charge the jury to disregard it, if so required. The charge here asked was of such a character, and should not have been refused.—Carlisle v. Hunley, 15 Ala. 623; McCurry v. Hooper, 12 Ala. 823.

R. W. WALKER, *contra.*

PARSONS, J.—Drane, who was plaintiff below, claimed the land for which he brought this suit, as purchaser at a sale under execution. The Circuit Court allowed the execution to be proved by one of the witnesses of the plaintiffs below, although its loss or destruction was not proved, nor its absence accounted for, nor was any transcript of the record embracing the execution offered. This, we think, was erroneous.

Let the judgment be reversed, and the cause remanded.

GILDERSLEEVE *vs.* CARAWAY, USE, &C.

1. A judgment final against a garnishee who has not answered, and against whom no judgment *nisi* has previously been taken, though irregular and erroneous, is not void, and is admissible evidence for the garnishee in a subsequent action against him instituted in the name of the defendant in attachment for the use of a third person to whom the debt was assigned after the rendition of the judgment.
2. When suit is brought on a promissory note, in the name of the payee for the use of his assignee against the maker, the latter cannot defend himself by showing that before the assignment of the note sued on, he was surety for the payee on a note to the Bank, that the payee became and continued to be insolvent, and that afterwards on account of the payee's insolvency, he had been compelled to pay the Bank debt, unless he also shows that such payment was made before the transfer of the note sued on, and notice thereof.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

JOHN A. CAMPBELL, for plaintiff in error:

The plaintiff contends there was error in the court below in excluding the judgments in the County Court. Those judgments it is admitted were irregular, but there is no foundation for the argument that they were void. The court had jurisdiction of the garnishee by the summons of the garnishment, and no judgment against him could be resisted as a nullity.

The irregularity of the proceedings was a matter of no consequence, except to garnishee.—Tubb v. Morring, Minor's R. 129; Parmer v. Ballard, 3 Stew. 326; 6 Ala. R. 296; 10 Ala. R. 298.

It may be admitted that if the debt had been transferred to the *cestui que use*, before the attachment of Robertson, Beal & Co., the judgment would be no protection, whether mentioned in the answer or otherwise, according to the case of Rich v. Colvin, 3 Port. 375. But no such fact appears in this case. The judgment offered was rendered in 1839; and the suit of the plaintiff was commenced in 1842. The foundation of the defendant's argument on this point is not in the record. The judgments were admissible, because pertinent to the issue, but the defendant explained that they were to be used in connection with other evidence which would establish a defence.—8 Port. 70; 3 Ala. R. 16.

The plaintiff (Gildersleeve) was entitled to indemnity from Caraway on his contract as surety for him to the bank.—Chitty on Bills, 347; Pitman Prin. & Surety, 125.

The failure of Caraway to pay the demand of the bank was a breach of the contract of indemnity, for which Gildersleeve would be entitled to recover damages. The payment of the debt to the bank ascertained the damages. The defence is allowable. 8 Ala. 206; 1 McMullen, 431.

Wm. G. Jones, *contra:*

1. The first point is in the exclusion by the court below of the records of certain judgments against the defendant as garnishee, which he offered in evidence in this case. The judgments were rendered against the defendant as garnishee, without his having answered, and without any judgment *nisi* having been rendered against him. Judgment final and absolute was rendered in the first instance, without answer or judgment *nisi*. This was undoubtedly erroneous, and the judgments might have been reversed on error. This the garnishee ought to have done. He is bound to see that the judgment is in all respects regular and valid. If he pays a judgment that is not valid, it affords no protection to him against a *bona fide* holder of the note under which his indebtedness arose.—Colvin v. Rich, 3 Por. 175; Crayton v. Clark, 11 Ala. 790; Stockton v. Hall, Hardin's R.

160–163; Lamkin, Adm'r. v. Phillips, 9 Por. 98–103; Fortune v. The State Bank, 4 Ala. 388; (in which last case it is said that it is considered indispensable to the safety of the garnishee, that he should sue out a writ of error to reverse an erroneous judgment against him;) Randolph v. Peck, 4 Ala. 389, in which a judgment rendered against a garnishee on the third day is spoken of as void; Jones & Cole v. Field, 5 Ala. 484. That a previous judgment *nisi* was necessary, see Lamkin, Adm'r. v. Phillips, 9 Port. 98; Lowry v. Clements, 9 Ala. 422.

2. The rights and interests of the assignee of a chose in action, and the beneficiary party in a suit at law, will be noticed, and protected by a court of law.—Lamkin v. Phillips, 9 Port. 98; Chisholm, use, &c. v. Newton & Wiley, 1 Ala. 371; Head, use, &c. v. Shaver, 9 Ala. 791.

3. The only remaining question is the supposed right of Gildersleeve to defeat this action for the use of Rhodes, on the ground of his being under a liability for Caraway to the Bank, incurred prior to the transfer of the note by Caraway to Rhodes. This cannot be maintained as an offset. If it can be maintained at all, which is not admitted, it can only be in a court of equity. This was so expressly decided in the Tuscumbia and Decatur Rail Road Company v. Rhodes, 8 Ala. 206; Cox v. Cooper, 3 ib. 256.

It will be observed that there was no plea of offset. The only plea was non-assumpsit.

PARSONS, J.—The judgment against Gildersleeve as garnishee, in the suit of Robertson, Beal & Co. v. Caraway, was final in the first instance, and without his answer. It was consequently erroneous, because, in such cases, the statute requires a conditional judgment in the first instance, and a *scire facias* to show cause. It appears by the judgment entry against Gildersleeve, that he had been summoned as a garnishee, and the judgment was final and absolute. Having been summoned, he was subject to the jurisdiction of the court, and we think the judgment against him, although erroneous, was not void. The judgment was rendered in the County Court of Mobile, in June, 1839. Caraway afterwards brought this suit, to the use of Rhodes, against Gildersleeve, to recover the same debt for a part of which the recovery had been had against him as Cara-

way's debtor, in the garnishment proceedings. The present suit was not brought until April, 1842. On the trial, Gildersleeve, to prove payment of a portion of the demand sued for, offered the minutes of the judgment of Robertson, Beal & Co. against Caraway, and of the judgment of the same plaintiffs against himself, as garnishee, in the same suit, which last, as already mentioned, was an absolute and final judgment, and proved that the original papers in the cases were lost or mislaid, and could not be shown, informing the court at the same time that he would also prove payment of the money specified in the judgment against himself as garnishee. The plaintiff objected to the introduction of the judgments, because the one against the defendant as garnishee was final in the first instance, and rendered without answer. The objection was sustained by the court, and the defendant excepted. The question is whether or not there was error in excluding the judgment against the garnishee, because it was irregularly taken. If the note upon which this suit is brought and which was made by Gildersleeve, and payable to Caraway, was, in fact, transferred to Rhodes before the judgment against Gildersleeve as garnishee, and if he had notice of the transfer, he should have answered and stated those facts at his peril; and in that case it would have beeen necessary for him to use all legal means to prevent or to reverse an irregular judgment against him.—Colvin v. Rich, 3 Por. R. 175; Foster v. White, 9 ib. 224. This would be required of him in order to protect the rights of the real party in interest, who was not before the court.

It was determined in Johns & Cole v. Field, 5 Ala. 484, that a garnishee cannot plead in bar of a recovery in a suit brought against him by the assignee of a note, that judgment *nisi* has been rendered against him as the debtor of the payee, and that he has paid the same, there not appearing to have been any *sci. fa.* issued or served on him, nor any final judgment against him. For this the court reasoned thus: "It cannot be pretended that this judgment was conclusive, that any action could have been sustained upon it against the garnishee, or that any execution could have issued under it against him." This reasoning marks the distinction between that case and this. The judgment in the present case was conclusive until reversed, and it would support an action upon it, or authorize an execution. All that can

be said is, that it was erroneous or irregular. But of this Rhodes had no cause of complaint, because it does not appear that there was any transfer of the note to him until a long time afterwards. The only evidence of his interest in the note is, that the present suit was brought to his use. It was not brought until April, 1842, but the judgment against Gildersleeve as garnishee, was in June, 1839. Therefore, as Rhodes was not injured by the irregular judgment, he cannot complain, and as it was relevant evidence, there was error in rejecting it.

2. The next exception cannot be sustained. The point excepted to was this, that Gildersleeve was surety of Caraway in two notes that were given by them to the Branch Bank at Mobile, before the assignment of the note sued on in this action, Caraway afterwards, to wit, in 1838, and thenceforth, being insolvent; that Gildersleeve was sued on, and paid these notes pending the suit; that he claimed to hold the debt sued on in this action, as indemnity for that liability, until otherwise indemnified. This was excluded by the court, to which the defendant excepted. It is consistent with the bill of exceptions to suppose that the two notes were paid, not only after this suit was brought, but after the transfer of the note now sued on and notice. Hence, such payment is not a defence in this action, whatever might be its effect in equity.—See the Tuscumbia and Decatur Rail Road Company v. Rhodes, 8 Ala. 206; Cox v. Cooper, 3 Ala. 256.

The judgment is reversed for the error first excepted to, and the cause remanded.

Dargan, C. J., not sitting.

CROWNOVER *vs.* SRYGLEY.

1. When the defendant against whom a judgment has been rendered by a Justice of the Peace, removes the cause by *certiorari* into the County Court, a judgment of *non pros.* cannot be rendered against the plaintiff, unless he has been notified of the issuance of the *certiorari.*
2. *It seems*, however, that cases removed from Justices' Courts by *certiorari*, are not embraced in the statute, (Clay's Dig. p. 315, § 17,) which secures to the appellee a right to notice of an appeal from the judgment of a Justice of the Peace.

ERROR to the County County of Lawrence.

R. O. PICKETT, for plaintiff in error:

To authorize a judgment of *non pros*, it should appear, that notice of the appeal has been served on the appellee as the statute directs, (Clay's Dig. 315, § 17.)—Wyatt vs. Avery, 14 Ala. 586. In this case no notice was given.

No counsel for defendant.

PARSONS J.—Crownover recovered a judgment against Srygley, before a justice of the peace in Lawrence county, the latter removed the cause by *certiorari* to the county Court, at its January term, 1848, which was the first term after the *certiorari* was granted, and a judgment of *non pros.* was entered against Crownover at that term, who had no notice of the *certiorari*, or of any of the proceedings thereon, so far as the record shows, nor was there any attempt to give him notice. We are not satisfied that the statute which secures to the appellee in a judgment rendered by a justice of the peace, a right to notice of the appeal, (Clay's Dig. 315) can be construed so as to extend to *certiorari* cases. We think that cases removed by *certiorari* were not within the contemplation of the Legislature, and they are not within its language.

And it has been settled that the statute which gives damages when it appears to the court that an appeal was taken for delay merely, does not apply to cases removed by *certiorari.*—Hudnell v. McCartney, Minor's 402; Childs v. Crawford, 8 Ala. 731. The principle is therefore settled, that those statutes which speak of appeals merely, do not include causes that are

recovered by *certiorari* from a justice of the peace, or at least that is so in respect of this case.

But we are satisfied that upon the principles of natural justice, and of the common law, a man can neither recover a judgment, nor lose the benefit of one which he has recovered, by any judicial proceedings without notice.

The judgment of the County Court is therefore reversed. But as that court is now abolished, and the causes in it transferred to the Circuit Court of Lawrence, under the late act, this cause is remanded to the said Circuit Court.

GILMER *vs.* WARE.

1. A slave was sold at public auction under a mortgage executed by B. to the Bank, and bought in by the bank agent, who sold him the next day at private sale to W. W. afterwards discovering that the slave was unsound, refused to give his note for the purchase money, but tendered him back to the agent, and demanded a rescision of the contract, which the agent refused. It was afterwards agreed between them, that the slave should be re-sold under the mortgage to the Bank, and that W. should pay whatever difference there might be between the price on the re-sale, and that which he had originally agreed to give. The slave was accordingly re-sold under the mortgage, at public auction, and purchased by G. *Held*, that the re-sale under the mortgage did not amount to a rescision of the contract between W. and the bank agent, but that W. was the owner of the slave at the time of the re-sale, and the party really and beneficially interested in the re-sale.
2. When the entire record affirmatively shows, that the plaintiff below can never recover, and the matter which renders a recovery impracticable is obvious and undisputed, the appellate court will not reverse in his favor, on account of errors in the charges of the court below.
3. When the purchaser of a slave sold at public auction pays the purchase money after he has been informed of the slave's unsoundness, and of facts which would constitute a fraud in the sale, he cannot afterwards recover damages in an action of deceit, on account of such unsoundness.

Error to the Circuit Court of Montgomery. Tried before the Hon. Robert Dougherty.

The material facts of the case, and the first charge of the court, are set out at length in the opinion of the court. The court below also charged the jury, that if they believed from the evidence, that before Gilmer paid the purchase money, he was informed by Whiting of the previous sale at auction, and of the sale to Ware, and of all that had been said by Ware and Benbow about the unsoundness of the slave, and he afterwards paid the purchase money, then the plaintiff could not recover. To this charge the plaintiff excepted. The plaintiff then requested the court to give a charge substantially the reverse of the one above given, which the court refused, to which refusal the plaintiff excepted.

Elmore & Yancey, for plaintiff in error.

Belser & Harris and Watts & Jackson, *contra:*

The only errors assigned are the charges given, and one refused:

1. The first charge merely asserts the proposition, that the facts stated constituted a conditional rescision of the contract between Whiting and Ware. If Whiting had authority to make the contract, he had the same authority to rescind. Assuming this fact, the charge certainly is not objectionable. But if it should be held objectionable, it is difficult to see how the plaintiff was injured by the charge.—12 Ala. 604; 2 ib. 730; 7 ib. 444; 5 Stew. & Port. 264; 4 New Hamp. 196; 5 Ohio, 380; Mason, 437.

2. (1) The 2nd charge merely asserts the proposition, that if a party with full knowledge of the facts and circumstances which constitute a fraud, recognizes or affirms a contract tainted with fraud, he cannot afterwards set up the fraud to defeat the contract. That this is law, see McGowan v. Garrard & Morgan, 2 Stew. 479; Landon v. Roane, 6 Ala. 518; Story on Contracts, 413, § 497; Parsons v. Hughes, 9 Paige, 591; 28 Eng. Com. Law, 29-30; 1 Adolph & Ellis, 40; Hough v. Richardson, 3 Story, 695-8; Selway v. Fogg, 5 Mees. & Welsby, 83; Chitty on Con. 680.

(2.) If, after the fraud practised on him comes to his know-

ledge, he deals with the subject matter of the contract, or does any act importing an intention to stand by it, or remains silent under circumstances which plainly indicate a continuing assent thereto, or if he acquiesce in the contract expressly, he cannot afterwards avoid it.—See Story on Con. 413, § 497, and all the authorities *supra*. And this is so, although he subsequently discovers other circumstances connected with the same fraud.—See Chitty on Con. 680-1; Campbell v. Fleming, 1 Adolph & Ellis, 40; Selway v. Fogg, 5 Mees. & Welsby, 83.

3. (1) The charge asked and refused may be construed to mean the reverse of the last one given; if so, the authorities cited above show that it was properly refused.

(2) The first part of it seems to assert the proposition, that if a party buys a negro, which is unsound, he can recover, if he offers to return within a reasonable time, when there was a warranty and no fraud. (This is not law.)—See Ricks v. Dillahunty, 8 Porter.

(3.) The form of the action does not make any difference as to the principles asserted under the second point. If the party has by his acts once waived the fraud, he cannot afterwards bring any sort of action to recover on account of the fraud. See the authorities above.

4. The facts set out in the bill of exceptions do not constitute a fraud. They show that the only object of a re-sale under the mortgages, was to settle the difficulty between Ware and Whiting. In order to constitute a fraud, there must be either a misrepresentation of something material, or a suppression of the truth with intent to deceive; and the purchaser must rely on the representations, and be deceived by them.—See Chitty on Contracts, 681-2-3. Hough v. Richardson, 3 Story, 690; Burnet v. Stanton & Pollard, 2 Ala. 181; Vanarsdale & Co. v. Howard, 5 Ala. 596. And the facts and circumstances constituting the fraudulent representations must be naturally calculated to mislead and deceive.—See authorities *supra*.

CHILTON, J.—This was an action on the case for deceit in the sale of a slave. The questions presented for our revision arise upon certain instructions which were given by the court to the jury, and which are set out in the bill of exceptions. The better to comprehend the points of law involved in the charges

as well as their applicability, it is necessary briefly to state the facts upon which they were predicated.

It appears that on the 5th day of February, 1849, the slave in controversy was sold under a mortgage, made by one Adam Benbow, to secure a debt due to the Branch of the Bank of the State of Alabama at Montgomery, and at said sale, which was by public auction, the said slave was bid in by John Whiting, who was at the time the agent and assistant commissioner of said Branch Bank. On the day after the sale, Whiting sold the slave to the defendant, Ware, for five hundred and fifty dollars, being an advance upon the price at which he had bid him in, and which sale was private; Ware agreeing to give his note to the bank on account of which the sale was made, after the sale; but on the same day, Ware came to Whiting and said that the boy was unsound, having a defect in one eye, to which Whiting replied, he expected this was not so, as Benbow said he was sound, and nothing was the matter with him. That upon an examination, they found one of his eyes defective, but Ware nevertheless did not object to him, or to complying with his contract. About two weeks afterwards, however, Ware called on Whiting, and said he would not comply, because he was told by one of his negroes that the boy had had a fit, and he had learned was subject to them, and that Benbow had told him the slave was subject to spasms when he had eaten any thing that disagreed with him; that although Benbow thought they were spasms occasioned from eating, he, Ware, thought they were fits, and that the negro was unsound therefrom, and asked Whiting to rescind the contract, which he refused to do. Thereupon, Ware tendered the negro back to Whiting, calling upon a witness to notice the tender, and demanded a rescision, which Whiting refused. On the first Monday in March, 1849, Ware again called on Whiting in regard to the negro, and desired him to rescind the contract, which Whiting says he refused to do, unless the arrangement hereafter to be stated amounted to such rescision.

In the interview last alluded to, Ware said the difficulty could be settled, if the bank would take back the negro and sell him, and Ware would pay the difference between the price he was to pay, and the price the slave should sell for. This Whiting refused to do. Ware then said, if Whiting would sell the

negro that day as the property of Benbow, under the mortgage, he would make up the difference, to which Whiting assented, and Ware requested him to write a note to Messrs. Lea & Norton, auctioneers, to sell the negro accordingly. Whiting asked if it was to be announced when the negro was offered for sale, that he was unsound. Ware replied, "no; say nothing about that, but to be sold without warranty." Whiting then commenced writing the note to Lea & Norton in this form. "Doctor Ware wished the negro sold" &c.; but Ware told him not to use his name, but his own, Whiting's; thereupon, the note was so written, and the negro sold at auction, and was purchased by Gilmer at $550 cash.

The auctioneer had an indistinct recollection that he announced when selling, that he had previously sold the same slave, but the witnesses who were present did not recollect that such declaration was made. It appeared, however, he was sold without warranty, not stating whether of title or soundness.

The evidence further showed that all sales made under mortgages to the bank were without warranty. Ware was present at the sale, and procured a person to bid against the other bidders, who at his request bid $540, and then ceased bidding.

It was also in evidence, that after the sale to Gilmer, the negro was delivered to him, and when he came to pay the money, Whiting said to him, that he was sorry he, Gilmer, had bought the negro, and then disclosed to him the previous sale, and all that had passed between him and Ware in regard to the unsoundness of the negro. Gilmer replied, that he supposed he had been buying at his own risk, and also said, that if what Benbow had said was true, the negro was a cheap bargain, and if what Ware said was true, he would send the negro up to some of the negro traders in Montgomery, and get them to sell him; and he then paid the money to Whiting.

It was proved that Ware was a physician; but there was no other evidence of his knowledge of the unsoundness of the slave than is above set forth. It was also shown that if the negro had been sound when sold to Gilmer, he would have been worth $700; that he was subject at that time to fits or spasms, which attacked him periodically, and deteriorated from his value, and that on the 27th day of March, 1849, Gilmer tendered the negro back to Ware, on account of such unsoundness.

The court charged the jury, that if they believed from the evidence that the bank sold the slave under the mortgage, and that Whiting as the agent of the bank purchased him, and afterwards sold him by private sale to Ware, and that Ware carried the negro back to Whiting, and refused to execute his note for the purchase money, because the negro was unsound, that although Ware might have proposed to rescind the contract, and Whiting refused, still, if in order to settle the difficulty, it was agreed that the negro should be sold again under the mortgage of Benbow to the bank, and Ware was to pay any difference if there should be any, between what he agreed to pay originally, and what the negro might sell for on a re-sale, it was a rescision of the contract on condition; and if the agreement was carried into effect, it was a rescision.

This charge, we think, cannot be supported as a legal proposition. It is very certain that Whiting refused to exonerate Ware from the obligation of the contract to pay $550, and this was the only portion of the contract which remained executory, as the negro had been delivered to Ware, and the contract fully executed by the bank. It is not pretended that Ware was in any wise discharged from his liability to pay the entire purchase money; but on the contrary, his liability remained wholly unimpaired by the subsequent arrangement between him and Whiting. The legal effect of this subsequent arrangement as it is disclosed by the proof, was not the cancellation of the prior contract, but it merely afforded Ware the opportunity of having the slave sold, perhaps for a better price than he could otherwise have sold him. In other words, it was a lending of the name of the bank by Whiting to effect a sale of the slave under the mortgage of Benbow for the benefit of Ware. As an illustration of this proposition, suppose the slave had sold for a mere nominal sum; Ware would still have been bound to pay the price originally agreed on. Suppose that after the arrangement for his re-sale, and before it could be affected, the slave had died, it is clear, the loss would have fallen on Ware, and not on Whiting or the bank. The re-sale was then to be at Ware's risk, the proceeds were to be applied for his benefit, and he alone was the party interested really and beneficially in the subsequent sale. We must look to the nature and substance of the transaction, to determine its true character, and not to the

mere formula employed to carry it out; and thus regarding, we cannot hesitate to pronounce that Doctor Ware was the principal in this sale; that the negro when sold, belonged to him; and that the mortgage was merely employed as an instrument under which to affect a more favorable sale. Consequently, that such arrangement, though consummated, did not in law amount either to a conditional or absolute rescision of the contract. This conclusion seems so clearly to result from the facts stated, that we deem it unnecessary to cite an authority in support of it. It is quite certain that no case has been cited, which tends to establish the contrary proposition.

But it is contended, that although this charge may have been incorrect, yet when taken in connection with the whole of the evidence, no injury resulted from it to the plaintiff in error. The rule is, as we have often asserted it, that where the entire record affirmatively shows that the plaintiff below never can recover, and the matter which renders a recovery impracticable is obvious and undisputed, the court will not reverse for other errors. A reversal in such case would not only be useless, but become the means of unnecessarily agumenting the costs.—Brook v. Young, 4 Ala. R. 584; Marshall v. Betner, 17 ib. 832. Were we to concede, that the facts set out in this bill of exceptions show that the plaintiff ought not to have recovered, yet we must go farther, and presume what the bill of exceptions does not show, that the facts before us were all that were proved in the cause upon the trial below, and are all that can be proved upon a subsequent trial.

Without entering into a particular examination of the other charge which the court gave, and the charge prayed for by the counsel for the plaintiff and refused, it will be sufficient for the future conduct of the cause to state the law as applicable to them.

We think it too clear to admit of argument, that if before the contract was consummated by Gilmer, by the payment of the price to Whiting, the latter informed him of the facts and circumstances which he now insists constitute a fraud upon him, and he nevertheless elected to consummate the contract, and paid the purchase money, such circumstances must be considered as though they had been known to him at the time of his purchase, and the deceit which they tend to establish regarded as

an agreed fact of the case.—See Story on Con. p. 44, § 497; Campbell v. Fleming, 1 Ad. & E. 40; Selway v. Fogg, 5 Mees. & Wels. 81; Chitty on Con. 634. If the contract had been consummated by Gilmer before a discovery of the fraud, he might have sued for the deceit according to some of the cases, without any offer to rescind the contract; but the facts of this record do not raise this question. Here, there was a sale for cash; the property had been bid off at auction, but the price was not paid, and before the payment the purchaser is advised of the circumstances affecting the soundness of the property, and with this knowledge, elects to proceed with the contract, deeming it perhaps a good bargain, and consummates the same by the payment of the money. Under such circumstances he cannot be said to have been defrauded, since his conduct amounts to a distinct admission that he was not deceived, and the circumstances of the alleged deceit or fraud become incorporated into, and form part of his purchase, which he concludes or consummates with a knowledge of them.

It results from what we have said, that the second charge given, when construed in connection with the evidence, was correct, and the charge refused, being substantially the reverse of that given, was properly rejected.

For the error in giving the first charge, the judgment must be reversed, and the cause remanded.

CROMPTON, *et als. vs.* VASSER, Ex'r.

1. When relief is prayed in a bill upon an alleged agreement, the agreement, if not admitted, must be proved *substantially as alleged.*
2. When lands are sold under an execution against the principal debtor, and purchased by one of his sureties with money belonging to himself and another co-surety, a third co-surety cannot claim to participate in the benefit of the purchase as an indemnity against his liability with the other sureties.
3. A bill which seeks to enforce the execution of a trust in the name

of a mere volunter, and for his benefit, must allege a declaration of the trust in his favor.

4. Courts of equity will not enforce, as in favor of a volunteer, a purely voluntary trust which is executory.

5. But when a person has constituted himself a trustee for another, and the relation of trustee and *cestui que trust* has been fully established, the trust may be enforced in equity for the benefit of the *cestui que trust*, although he is a mere volunteer.

ERROR to the Chancery Court of Dallas. Tried before the Hon. W. W. Mason.

THE bill was filed by John Crompton, G. M. Bender and Henry T. Crompton and wife against Littleberry Vasser as executor of John E. Vasser, deceased. It alleges that John Crompton, Bender and John E. Vasser were bound, prior to May, 24, 1839, and at that time, as securities for said Henry T. Crompton, on two promissory notes, each for about $1,000, one due to the State Bank at Tuscaloosa, the other to the Branch Bank at Mobile; that on or about May 24, 1839, the sheriff of Wilcox county being about to levy executions in his hands on certain lands in that county belonging to said Henry T. Crompton, it was agreed between said John E. Vasser and the complainants, that Vasser should become the purchaser of said lands, with $200 of his own money, and the balance to be furnished by said John Crompton, and should hold and dispose of the same for the indemnity of himself and his co-sureties on said bank debts, and also for the relief of said Henry T. Crompton and wife; that Vasser accordingly became the purchaser of said lands at the sheriff's sale, and after the sale, but on the same day, executed an instrument in writing, wherein he acknowledged and set forth the purposes and objects of his purchase. This instrument, which is the "Exhibit A," spoken of in the opinion, recites that the land was to be returned to H. T. Crompton on his paying said two bank debts and also refunding to Vasser the two hundred dollars which he had advanced on said purchase, and that when said bank debts were paid and said $200 refunded, Vasser bound himself to convey said lands to Mrs. Compton and her heirs.

The bill also alleges that said Vasser afterwards, in November, 1840, with the assent of complainants, sold said lands to

one Maxwell, together with certain other lands in Monroe county, which had been sold by the Sheriff of Monroe county as the property of Henry T. Crompton, and for which Vasser and John Crompton held the sheriff's title deed, and took Maxwell's five notes for the purchase money, one for $740, payable to said Vasser on the 1st April, 1841, and another for $500, payable to said Vasser, January 1, 1842, another for $200, payable to said Vasser, January 1, 1843, another for $300, payable to said Vasser, January 1, 1844, and another for $500, payable to said John Crompton, January 1, 1843; that said John Crompton received said note of $500 payable to himself, as a partial indemnity against his said liability for H. T. Crompton on said bank debts; that Vasser afterwards assigned to John Crompton, for the use of Matilda Crompton, the wife of H. T. Crompton, the note for $500, due January 1, 1842; that Jno. Crompton had paid said debt to the bank at Tuscaloosa, when it became due, and payment was about to be coerced, and that he had not been in any manner indemnified for such payment; that he had not collected any thing on the note of Maxwell which he had received, and did not expect to collect any thing from it for a long time, as Maxwell had signified his intention to litigate it, and if collected the proceeds would not reimburse him for what he had paid to the Bank at Tuscaloosa; that the debt due to the bank at Mobile had become due, and coercion of payment was threatened; and that Vasser's executor refused to appropriate the proceeds of Maxwell's notes, which had come to his hands as executor, to the payment of said bank debt, or the indemnity of complainants, Bender and John Crompton, against their liability therefor.

The bill prays an account of the trust funds which have come to the hands of the executor, and such an application of the funds as will most effectually protect Bender and John Crompton against their liability for said bank debt.

The executor, in his answer, denies all knowledge of the parol agreement alleged in the bill, and insists that Vasser purchased the lands in Wilcox county with his own money, and that he gave said $500 note on Maxwell to John Crompton for his interest in the lands in Monroe county.

J. P. Saffold, for plaintiffs in error:

It has been decided that a bill does not become multifarious

because all the plaintiffs are not interested to an equal extent.—Knye v. Moore, 1 S. & S. 61; 1 Dan. Ch. Pr. 396.

And where several persons claim under one general right, they may file one bill for the establishment of that right without incurring the risk of a demurrer for multifariousness, although the title of each plaintiff may be distinct.—Powell v. The Earl of Powis, 1 Y. & J. 159; 1 Dan. Ch. Pr. 396.

If a bill does not pray for multifarious relief, it cannot be objected to for multifariousness, though the case stated would support a prayer for multifarious relief.—Boyd v. Hoyt, 5 Paige 65; 1 Dan. Ch. 384, N. 1.

In chancery all persons whose rights may be affected by the decree must be made parties to the suit.—Harris *et. al.* v. Carter's Adm'r., 3 Stew. 233.

"It is a general rule that all persons whose intererests are to be affected or concluded by a decree, ought to be made parties."—Judson v. Emanuel *et. al.*, 1 Ala. 589.

"In order to prevent multiplicity of suits, courts of equity sometimes entertain bills by complainants between whom there exists no privity of contract."—Kennedy's Heirs v. Kennedy's Heirs, 2 Ala. 572.

Where several persons are interested in the distribution of a trust fund, this is a sufficient privity to warrant their being made parties to the same bill, either as plaintiffs or defendants.—Toulmin *et. al.* v. Hamilton, 7 Ala. 362.

It is no objection that a trustee and *cestui que trust* unite in the same bill; they constitute but one.—Hitchcock's Heirs & Adm'r. v. U. S. Bank, 7 Ala. 386. See also Harkins *et. al.* v. Pope *et al.*, 10 Ala. 496.

"All persons legally or equitably interested are proper parties, as the court will not act by halves, but adjust the matter fully between all concerned.—Story Eq. Pl. §§ 72–3–4–5; Ib. 137–8; 2 Paige, 278; Knight v. Knight, 3 P. Wms. 331. See also M. & C. P. R. R. Co. v. Talman, 15 Ala. 472, case of two mortgages.

As to the misjoinder—"When a demurrer or plea is put in for the want of proper parties, if a demurrer, it must appear, if by plea, it must be shown, who are proper parties."—Story's Eq. Pl. § 238, p. 203; 1 Dan. Ch. Pr. 333.

Demurrer should show matter of objection, 30th Rule, Clay's Dig. 616.

As to the misjoinder again—They have no right to object for a misjoinder of parties complainants under the demurrer filed. That there is a want of proper parties, see Dan. Ch. Pr. 665. Also see the rule of Ch. Pr. 30 Clay's Dig. 616. If the cause of demurrer must be given by our own rules, it would seem no other ought to be allowed.

HUNTER, *contra:*

1. The bill is fatally defective on account of a misjoinder of parties. No averment is made which shows a joint trust for Mrs. Crompton and the sureties—the trusts are wholly distinct. The bill sets up the written trust for her benefit, and makes it an exhibit, and avers no fraud or mistake in it. She can, therefore, set up no trust in relation to this matter, except the written one. This view shows beyond all question, that her trust is entirely distinct. There is no averment that there will be a balance to go to Mrs. Crompton. This objection also shows that the bill is multifarious, and must be dismissed for that reason. See as to misjoinder of parties, Agee v. Steele, 8 Ala. 948; Story's Eq. Pl. § 499, p. 509; 14 Ala. 195. As to multifariousness, McIntosh v. Alexander, 16 Ala. 87; Story's Eq. Pl. p. 308, § 279. Not only does the bill fail to aver a surplus for Mrs. Crompton, but the amended bill plainly shows that there can be no surplus—that she has received $500, all that is due her.

2. The bill must be dismissed because there is a failure to prove a right of action in all the complainants. This court has recently held, that a bill will be dismissed if there is a failure to prove the case as to any of the complainants. There is an entire failure to make out a case in favor of Mrs. Crompton, as either one of two reasons conclusively proves. 1st: She is confined to the written trust, and it is not pretended that she has proved a case entitling her to have an execution of that trust.—Hair v. La Brouse, 10 Ala. 554; Paysant v. Ware, 1 ib. 164; McKinstry v. Conly, 12 ib. 678; Freeman v. Baldwin, 13 ib. 246. 2d, There was no consideration for any trust to Mrs. Crompton. For that reason it is certain that any parol trust is void, and cannot be enforced in her favor.

3. To establish a parol trust very great strictness of proof is

required.—McKinstry v. Conly, 12 Ala. 678; Freeman v. Baldwin, 13 ib. 246; Fonblanque's Eq. p. 170 note, and 372 note; Boyd v. McLean, 1 John. Ch. R. 590; Steene v. Steene, 5 ib. 1.

4. Here after the pretended parol trust was entered into, it was finally reduced to writing. It is now proposed not only to add to that written trust, but also to contradict it by setting up a trust inconsistent with and subversive of it. See Mead v. Steger, 5 Por. R. 498; Cuthbert & Stanly v. Bowie, 10 Ala. 163.

5. As to the effect of the proof. Considering that the whole proof consists merely in conversations and transactions, however satisfactory in themselves, entirely loose, their character and their force is completely broken by the written trust and the evidence tending to show a settlement of the trust if there ever was one.

PARSONS, J.—The complainants in the bill are John Crompton, (who died pending the suit,) Griffin M. Bender and Henry T. Crompton and his wife, and the bill having been dismissed by the Chancellor, the complainants are now plaintiffs in error. We will speak first of the lands in Wilcox, as to which the bill alleges that there was an agreement between the complainants and Dr. John E. Vasser, pursuant to which these lands were purchased by him, partly with his own and partly with John Crompton's money, for the purposes mentioned in the bill, and sold by him to Maxwell, by consent of the complainants, in fulfilment of the objects of the purchase. This trust is alleged to have grown out of an agreement between or among all the parties. A distinct agreement is stated, and out of this, if true, the trust arose, and the rights of the several parties are to be ascertained by the agreement, and also the duties and obligations of the trustee. The bill clearly puts the claim of the complainants upon this foundation and no other. But is the bill sustained by the evidence? The allegation of the agreement between or among Dr. Vasser and all the complainants is neither admitted by the answer, nor proved. We know that some parts of the evidence tend to prove such an agreement, but in our judgment, they are not sufficient to establish it. It is, for instance, by no means satisfactorily proved that Mr. Bender was a party to any actual contract or agreement of the kind. It may be said that there was some such an agreement between Dr. Vasser

and John Crompton, by which Bender was secured as one of the securities of Henry T. Crompton. But if it were so, the allegation of the bill, according to which Bender was a contracting party, is not proved to be true. The agreement, therefore, not being such as is alleged, can be no ground for a decree in favor of Bender, nor, indeed, in favor of any of the parties. For it is indisputable that an agreement alleged, upon which relief is prayed, must be admitted or proved, substantially as alleged.—Mason's Adm'rs. v. Maury's Adm'r., 8 Port. 211.

2. Bender, therefore, not being entitled to relief upon any contract alleged in the bill and admitted by the defendant or proved, it becomes necessary to inquire whether he can be relieved upon the fact of his relation as co-surety. Putting the agreement, whatever it may have been, out of the way, and the additional facts are, that Dr. Vasser purchased the lands in Wilcox at a sale made by the sheriff under an execution in favor of another person against Henry T. Crompton, and that the purchase money was paid in part out of his own and in part out of John Crompton's money, according to some of the evidence. Upon those lands the sureties had no previous lien or claim whatever. The right of Dr. Vasser and John Crompton thereto is the same as if they had belonged to, and been sold as the property of a stranger to all the transactions; in which case it is evident, Bender could not claim to participate in the benefit of them as an indemnity against his liability as co-surety with Dr. Vasser and John Crompton for Henry T. Crompton. It would have been otherwise if Vasser and John Crompton had obtained an indemnity from Henry T. Crompton, their principal in the debts, by an arrangement with him.

3. It is alleged in the bill that Dr. Vasser acted upon the trusts, but the allegation is in reference to the trusts that were created and defined by the supposed agreement with all the complainants, by which, consequently, his liabilities and duties are to be ascertained, but as the agreement was not proved, the Chancellor could not proceed upon it. If he assumed, or was bound for any other trust duties, it is not stated in the bill, unless so much of the bill as relates to the certificate marked A, and exhibited with the bill, is an exception to this, and of that we will speak in another part of this opinion.

4. But if it were conceded that the bill is so drawn as not to

be liable to the observations just made, then the question is, can Bender recover upon the facts admitted or proved? He is a mere volunteer; he was a party to no agreement, and advanced no consideration. If a trust for his benefit had been declared, and that fact accordingly alleged in the bill, we would consider his case upon that ground; but there is no allegation of the sort in the bill, for we will show in another place, that the paper marked A, which is stated in the bill, can avail nothing in this suit. A declaration of trust should be stated in the bill.—McFadden v. Tuskyus, 1 Phillips R. 153; 1 How. 458; 1 Keene 558, notes.

5. If Bender can recovor at all, therefore, it is upon the ground that the trust for his benefit was actually and completely created. Courts of equity will not enforce a mere voluntary trust which is executory. Judge Story adds, "and, upon the same ground, if two persons, for a valuable consideration as between themselves, covenant to do some act for the benefit of a third person, who is a mere stranger to the consideration, he cannot enforce the covenant against the two, although each one might enforce it against the other. But it is otherwise when the use or trust is already created and vested, or otherwise fixed in the *cestui que trust;* or, when it is raised by a last will and testament."—2 Story's Eq. § 973. The only agreement which is stated in the bill is not proved. If Bender can recover at all, it is upon the supposition that there was a use or trust, not executory, but actually created and vested, or fixed in him as *cestui que trust.* The cases of Coleman v. Sorel, 3 Bro. C. C. 12; S. C. 1 Ves. jun. 50; Ellison v. Ellison, 6 Ves. 656, and Pulvertoft v. Pulvertoft, 18 Ves. 84, and 1 Keene 558, notes, show that when a trust is actually created in favor of a volunteer, a court of equity will enforce its execution. And it seems that a party may so constitute himself a trustee that a court of equity will execute the trust in favor of a volunteer.—*Ex parte* Pye and *ex parte* Dubost, 18 Ves. 149. Then, if Dr. Vasser did constitute himself a trustee for Bender, so that the trust was completely created, and intended for the benefit of Bender, or of Bender and others, and the relation of trustee and *cestui que trust* fully established, it may be enforced in equity for Bender's benefit, although he is a volunteer. But all this must have been done, and it must appear by evidence that is in all respects sat-

isfactory. We are not convinced that there was a certain trust actually created, with intention to make Bender individually, or with others, a *cestui que trust*, with vested rights as such. This may have been so; there is evidence tending to such a conclusion, but we cannot affirm that it is satisfactorily proved. Dr. Vasser doubtless expected the debts to be paid out of certain resources, and desired and intended, in that event, that Bender should be relieved of his liabilities. But we think Bender's relief was not, or, at any rate, is not clearly proved to have been a motive or object of the transactions, though it might, perhaps, be a consequence of them. In this view, the exhibit A does not create a trust for Bender, or make him a *cestui que trust* with certain or fixed rights. But the last answer of the defendant expressly denies that the lands mentioned in that exhibit were the same that are mentioned in the bill as having been purchased with the joint funds; and to our apprehension it does not clearly appear that they were the same; but if they were, there are reasons why that circumstance would not change our opinion of the rights of any of the parties.

6. As to the lands in Monroe, we do not discover by the bill, what interest or rights, if any, in respect of them, is claimed by Bender. But if it was the object to assert any rights in his behalf in that respect, an answer is to be found, in what has been already said. We have spoken more particularly of the case in relation to Bender, because it appears that he paid part of the debt to the Branch Bank at Mobile, and it does not appear, as we understand the case, that it was all paid back to him. The residue, however, is far less than his proportion of the debts as one of the sureties. Yet if there was ever an effectual trust created in his favor, it is still a subsisting one as to the extent of the residue. His claim in this last view is already answered.

7. The Chancellor dismissed the bill on the whole evidence and pleadings, upon the merits of the case, considering the evidence uncertain and insufficient, and because it tended to show that there was no subsisting trust. We cannot say that he was in error. We do not understand the counsel of the plaintiffs in error to contend that, in this suit, there should have been a trust declared or a decree of specific performance upon the exhibit A, in favor of H. T. Crompton or his wife.

The decree is affirmed

HUGHES *vs.* MITCHELL.

1. A final settlement made by a guardian with the Orphans' Court, in which a balance is found to be due from him to his ward, is evidence against him of a debt for the amount of that balance due from him to his ward, although as a judgment, the settlement would be considered void, because not rendered in favor of any one, and no execution could issue upon it.
2. A guardian who has notice of a debt due to his ward, and makes no attempt to collect it, is chargeable on final settlement with the amount of the debt, if it is lost through his negligence.
3. When property of the guardian is sold under execution issued on a final decree rendered against him by the Orphans' Court, and the sale is afterwards set aside, and the execution quashed on account of the reversal of the decree by the Supreme Court, the guardian is not entitled on another final settlement, to a credit for the amount for which the property sold, or any part thereof. The title to the property, if ever divested at all, being restored to him when the sale is set aside, the presumption arises in the absence of all proof to the contrary, that he has regained the possession of it, or at least that its value has not been lost to him.
4. When a guardian is charged with a particular sum which has been litigated, he is also properly chargeable with the costs attending the litigation of it.

ERROR to the Orphans' Court of Lowndes.

David Hughes, guardian of Flora Ann Ringstaff, was cited by Daniel Mitchell, the succeeding guardian, to make a final settlement in the Orphans' Court of his said guardianship. Several exceptions were taken by Hughes to the decisions of the Orphans' Court, which are now assigned as errors.

BOLLING & J. B. STONE, for plaintiff in error:

1. The evidence is not sufficient to charge Hughes with the $294 65-100, supposed to be in the hands of Measels, the former guardian of the ward. There was no evidence but the pretended settlement of Measels. The record does not show such a decree against Measels, that Hughes could have enforced it by execution, (Willis v. Willis, 9 Ala. 721.) The pretended decree against Measels is void.—Ashley's Distributees v. Ashley's

adm'r., 15 Ala. 17. It is not even *prima facie* evidence against Hughes, he being no party to it; and the court should have excluded it as evidence.—1 Stark Ev. 187, *et seq.* 1 Am. Ed. ib. 286; 16 Ala. 67; Williams & wife, v. Harrison at the present term.

2. The court could not charge him with the cost of former trials in which he had been successful in resisting the payment of the $294 65-100 and interest. It could at most, only charge him with the cost of the case before it.

3. The plaintiff in error should have had credit for the nett proceeds of the sale of the three slaves in Coosa, by the sheriff, and of all the sales of property. Mitchell could and ought to have collected the note on Mastin, which he received as cash from him. Mastin having purchased the three slaves sold in Coosa, and having given his note for the purchase money, by the consent of Mitchell, the guardian, makes Mitchell as responsible for the money, as though it was in his hands. It is no excuse that he has not collected the note; Mastin could not retain the slaves, and resist the payment of the purchase money, (he has not yet accounted for one of them) and the two sold last were sold as his property, and not as the property of Hughes. In legal contemplation, he is in possession of all of them.—Ogburn v. Ogburn, 3 Por. 127; Harris v. McConnegeh, 18 Ala. R.

The subsequent sale of two of these slaves by the sheriff of Lowndes does not alter the case; for they were sold as the property of Mastin. This is shown by his having given a forthcoming bond when they were levied upon. Neither do the motions by Jno. L. Tomlinson to quash the several executions, and set aside the several sales, change the question. Hughes is not bound by the acts of Tomlinson, and the acts of the court on these motions amount to nothing. But admitting all this against plaintiff, so long as the slaves are withheld, he should have a credit for their value, or what they were sold for.

Should the court however, refuse to allow Hughes a credit for the two slaves last sold, he should at least have credit for the value of the one not accounted for, and also for the proceeds of the sales of the land.

4. Hughes was cited to settle his own accounts as guardian. He has settled for his own acts. The proceeding was not to make him liable for the balance in the hands of Measels, on his last settlement.

STONE & JUDGE, *contra:*

1. An administrator is chargeable with claims lost by his neglect. He is *prima facie* liable for the debts due the intestate, which he did not return as desperate.—Brazeal v. Brazeal, 9 Ala. 491; Duffie v. Buchanan, 8 Ala. 27; Willis v. Willis, 16 Ala. 653.

2. The question of costs must be to a great extent, discretionary with the primary court; but if we are wrong in this, the court correctly decided that plaintiff in error must pay the costs incurred by his own unjust attempt to rid himself of that item. Jones v. Dyer, 16 Ala. 221.

3. All the executions and the sales under them, both of land and slaves, were set aside and quashed on the motion of plaintiff in error, and his securities. No money was ever paid under either of the purchases; and the evidences were cancelled. But even if the money had been paid, the party paying has the right to recover it back from the person who has the money. Hughes' property and rights of property are restored to him; and if he has not the possession, he can recover it. No rights have passed from him under the sales now set aside; and surely, he is not entitled to a credit for the sales.

4. If the decree against the former guardian was not in such form as to permit an execution to issue, it was the duty of Hughes to put it in proper form and collect it. No other person had the right to recover in the matter, and this court has several times recognized his right to do so.—McLeod v. Mason, 5 Por. 223; this case, 11 Ala. 563.

5. The order on the Orphans' Court minutes, ascertaining the amount due from Measels the former guardian, was sufficient to put Hughes on diligence to ascertain whether that sum was due, and to collect the same; and this is the more clear, as Hughes had been required to charge himself with the same as so much cash. If the account current of Measels did not warrant the informal decree, Hughes should have produced the account current, and shown that fact. If there had been no account current, or no authority for the decree, the plaintiff in error would have shown it.

DARGAN, C. J.—I cannot doubt but that the settlement made by William Measels as guardian of Flora Ann Ringstaff, as evinc-

ed by the orders of the Orphans' Court of Lowndes, is evidence as against him of a debt due to his ward. It is provided by statute, that the documents and evidence of all settlements made with executors, administrators, and guardians, shall be carefully preserved by the clerk of the County Court, and the settlement entered of record; which evidence, vouchers, documents and settlement shall be good evidence, in any suit for or against such executor, administrator or guardian, and shall not be impeached, unless for fraud in obtaining the same.—Clay's Dig. 304, § 37. It is under the influence of this act, that we have held that the final settlement of the accounts of executors and administrators, made in the Orphans' Court, showing the indebtedness of such executors or administrators, is conclusive alike upon them and their securities.—Williams v. Howell, 4 Ala. 693; Chilton v. Parke, 14 Ala. 671; Perkins v. Moore, 16 Ala. 9.

It is however argued that this final settlement as a judgment, would be considered void, because it is not rendered in favor of any one, and no execution could have issued upon it, for the amount ascertained to be due from Measels, the guardian, to his ward. This may be true; but we do not think the consequence follows, that the settlement is not evidence of an indebtedness from the guardian to the ward. The Orphans' Court had jurisdiction, and its orders show that the guardian entered into a final settlement, and he was found indebted $294 65-100. This is evidence of a debt due from him to his ward.

The next question that grows out of this branch of the case is, whether Hughes, who was appointed guardian of the ward in the stead of Measels, is chargeable with this debt, he never having taken any measures to collect it. We think it clear that a guardian who has notice of a debt due to his ward, should not, through mere negligence, suffer it to be lost. If he does, he should be charged with the amount.—Willis v. Willis, 16 Ala. 653; Brazeal v. Brazeal, 9 Ala. 491; Duffie v. Buchanan and wife, 8 Ala. 27. The evidence shows that Surles, one of the securities of Measels, was solvent, that he remained in the State for more than five years after Hughes was appointed guardian, and then removed from the country, whereby the debt is lost. Had measures been taken by Hughes during this time to collect the debt, it could have been done. But it has not been, and the loss is fairly attributable to his neglect, and he must bear the consequences.

It appears that two decrees have heretofore been rendered in this case, both of which have been reversed by this court, upon the first of which two executions were issued. One was delivered to the sheriff of Lowndes, the other to the sheriff of Coosa. The sheriff of Lowndes levied on certain lands as the property of Hughes, which he sold in June, 1845, and John L. Tomlinson became the purchaser bidding a sum sufficient to pay all the costs, and $78 98-100 of the principal. In Aug. 1847, a motion was made to quash the executions, and set aside the sale, which was granted. There is no evidence that the money was refunded to Tomlinson, or that he ever obtained possession of the land. The guardian, Hughes, asked to be allowed a credit to the amount of this sum, which was refused by the court, and he excepted. We think the court correctly refused this sum as a credit. It is clear that the execution being quashed, and the sale set aside, Hughes has not lost his title to the land. He therefore paid no part of this sum. The money belonged to Tomlinson, and Hughes cannot insist upon it as a payment by himself. But it is contended that it ought to have been allowed as a credit, for the reason that Tomlinson being the security of Hughes, who is now insolvent, it is but reasonable to presume that Mitchell has retained the money, because he had an equitable right to it. We will not discuss the right of Mitchell to retain it, nor the right of Tomlinson to demand it. The proceedings are against Hughes, he has no right to the money, and consequently cannot insist upon it as a payment by him, or as a credit to which he is entitled. This can be settled between Mitchell and Tomlinson, if ever Tomlinson is called upon to pay any more, if indeed it has not already been adjusted between them. Under the execution delivered to the sheriff of Coosa, three negroes were sold as the property of Hughes, for the sum of $540, which were purchased by William Mastin, who was also one of Hughes' securities; Mastin did not pay the money, but executed his note to Mitchell for the amount; afterwards this execution was quashed, and the sale was set aside, and Mastin and Mitchell agreed that the note given for the purchase money at sheriff's sale should be considered null and void, and it never has been collected; another execution issued upon the second decree, and two of these three negroes were sold under it for $478; they were levied upon in the possession of Mastin. It is not shown what became of the

third slave, and no other evidence was offered to show that it was lost to Hughes in consequence of the sale. The court allowed him a credit of $478, being the amount for which the two slaves were sold under the second decree, but refused to allow him a credit for the value of the other. As the execution upon the first decree, under which the slaves were sold, was quashed and the sale set aside, and Mastin never having paid the purchase money, it is manifest that the title of Hughes, even if it was divested by the sale, was restored to him, and in the absence of all proof to the contrary, it is but a reasonable presumption that he regained the possession of the slave, or at all events, that the value of the slave has not been lost to him. We cannot indulge in the presumption, that Hughes has never regained this slave or its value, there being no proof what became of it. It is not therefore necessary to enter into an examination of the question, whether Hughes would have been entitled to a credit for this slave or its value, if it had been shown that, by the sale which was set aside, the slave was lost to him. We think the court ruled correctly, in allowing him a credit for the amount the two slaves bought at the second sale, and refusing him a credit for the value of the third.

In regard to the cost that has accrued in consequence of the litigation of the item of $294 65-100, we think the court correctly charged them against Hughes. The controversy grew out of his failure to collect this sum from Measels and his securities, it therefore grew out of his neglect, and he was properly charged with the debt. We can see no reason why the estate of the ward should bear the expense of litigation which grows out of the neglect, and improper conduct of the guardian, especially when he is unsuccessful, and is charged with the sum in reference to which the litigation arose. As the ward is entitled to recover this sum against him, and the litigation was improper on his part in denying his liability, he was not charged with the costs improperly.—Jones, adm'r. v. Dyer and wife, 16 Ala. 221.

Upon the whole, we can discover no error in the decree, and it must be affirmed.

BOWER *et al.* *vs.* SALTMARSH.

1. When issue is taken upon the facts stated in a petition for a *supersedeas*, neither the affidavits of the parties nor the depositions of incompetent witnesses are admissible.

ERROR to the Circuit Court of Lowndes. Tried before the Hon. Geo. Goldthwaite.

STONE & JUDGE, for plaintiffs in error:

1. In cases of application for the satisfaction of judgments, the affidavits of parties are competent evidence, and are sufficient to prove payment, unless the facts are controverted by the oath of the opposite party.—Faulkner & Faulkner v. Chandler, 11 Ala.725. The truth of the affidavits is not controverted by the oath of the opposite party, or by other testimony.

2. Payments made in specific articles, or merchandise, if accepted as such, are as good as payments in money. In this case we think the proof clear that the whole account was to be taken as payment; and if we are at fault in this, there can be no doubt that the $1000 was to be payment *pro tanto*.—Solomon Damer v. Sinclair, 15 Vermont, 495.

3. Proceedings of this character are governed by the rules which govern chancery proceedings. This being the case, this court should proceed to render such judgment as the primary court should have rendered, and enter satisfaction in whole or in part, as the facts of the case may justify.

G. W. GAYLE, *contra:*

1. The evidence of Bower and Haig was properly excluded, because, 1st, a party to whom a chose is due by parol, cannot be a witness against defendant, when sued on, even for the use of another. The *supersedeas* is a suit upon the chose for the use of petitioner.—See Goodwin v. Harrison, 6 Ala. 438; Houston v. Prewtt, 8 Ala. 846. 2d, They are directly interested in the event of the suit, being still liable to Smith if the transferred account is not allowed.—See Bean v. Pearsall, 12 Ala. 592; Taylor v. Paullin, 11 Ala. 512.

2. The affidavit of Smith was properly excluded from the trial, as evidence, because, 1st, he is a party to the record, being

plaintiff in the suit, and cannot give evidence for himself.—See Stone v. Bibb, 2 Ala. 100; ib. 388; Owen *et al.* v. Paul, 16 Ala. 130. 2d, Supersedeas allowed, is the commencement of a suit. See Shearer v. Boyd, 10 Ala. 279.

3. Smith's remedy is in a court of equity, to apply the transferred account to the judgment, if the account is correct, &c. There let him go.

CHILTON, J.—This was a proceeding by *supersedeas* to obtain a credit upon an execution for certain sums which, it is alleged, Saltmarsh agreed should be allowed as such. Issue was taken upon the facts set forth in the petition, and by agreement of the counsel, was submitted to the court to be tried as by the jury.

The plaintiffs offered to read the affidavit of Smith and the deposition of Wm. Bower, two of the plaintiffs, and also the deposition of one Haig, the partner of Bower, to prove the credits insisted upon; Haig being offered to prove an account which he had transferred to Smith, and which constituted one of the items sought to be established as a payment. It will thus be seen, that two of the witnesses were parties to the suit, and the other, as the transferror of a chose in action, was clearly interested in making such testimony as would render his transfer effectual. But it is insisted by the plaintiffs in error, that the proceeding by *supersedeas* is unlike proceedings in an ordinary suit; that it is in the nature of an equitable remedy, and that the parties should be allowed to testify, or, which is the same thing, to submit their affidavits as to the matters involved, and we are referred to the case of Falkner v. Chandler, (11 Ala. 725,) as sanctioning this practice. That was a motion to enter satisfaction of a judgment, upon the ground that a judgment had been rendered against the defendant for the same demand attempted to be enforced against him by execution, on a garnishment which he had paid, and the record evidence of which garnishment process and judgment he produced in court. The parties being informed that they could submit affidavits if they thought proper, Chandler, who sought to establish the facts, made affidavit to the facts stated in his petition, which averred the judgment on the garnishment and its payment by him; and the defendant, it is said, declined to make affidavit, but objected to the allowance of

the affidavit of the plaintiff in the motion. The court, however, decided that upon a motion to enter satisfaction of a judgment, the affidavits of the parties were admissible, and that an affidavit of the payment made by the party seeking to establish it was, *prima facie*, sufficient, unless contradicted by the other party.

It is unnecessary in the case before us to call in question the decision just referred to. We are aware that the courts have gone great lengths in receiving affidavits and cross affidavits, in regard to matters of fact which are involved in the exercise of their discretionary powers in granting or overruling motions. The case before us is a suit by *supersedeas*, and issue was regularly made up, as in other cases, to be tried by a jury, and that the parties agreed to substitute the court for the jury does not affect the rules of evidence. Now, if the case of Faulkner v. Chandler intended to affirm the doctrine that upon the trial of such issue the parties themselves would in all cases be competent witnesses, or that their *ex parte* affidavits could be received against the consent of the opposite party, we should not hesitate to depart from it. We have several times intimated that the proceeding by *supersedeas* was in the nature of the obsolete writ of *audita querela*. According to the English practice, where the defendant was unquestionably entitled to relief upon *audita querela*, the courts would relieve him on motion, without driving him to that writ; (Lester v. Mundell 1 B. & P. 427; Giles v. Nathan, 5 Taunt. 558;) but where the relief was questionable, the court would not dispose of the case upon motion, but would leave the defendant so to proceed that the plaintiff could demur or bring error.—Ib.; see also Bing. on Ex. 264. In the case before us, the issue, as we have said, was regularly made up to be tried by a jury, and must be tried as other issues of fact submitted in ordinary cases. We will not say that the court had not the power to entertain a motion to enter satisfaction, aside from the pending proceedings, had it clearly appeared that the judgment was satisfied; but the judge was not bound to do so, and should not have done so, the facts being doubtful and controverted. Upon this trial, we think it clear that the court properly rejected the affidavits of the parties, and the deposition of Haig, who was clearly interested.

Let the judgment be affirmed.

WILLIAMS & WIFE *vs.* HARRISON, GUARDIAN, &c.

1. Guardians, executors and administrators, who enter into a joint bond for the faithful performance of their duties, are liable for the acts and defaults of each other, *unless the bond itself shows*, that they did not intend to become bound for each other's defaults.
2. The Orphans' Court has jurisdiction to compel guardians who have given a joint bond to account for each other's defaults.
3. *It seems*, that the Orphans' Court may render a *joint decree* against joint executors, administrators or guardians, when they are jointly liable for the acts of each other.
4. When guardians have given a joint bond, and one of them dies insolvent, the surviving guardian may be directly charged in the Orphans' Court, not only with his own defaults, but also with those of the deceased guardian.
5. When two guardians have given a joint bond, one is not liable for a default committed by the other, while sole guardian, before the execution of their joint bond.
6. When money is shown to have come to the hands of a guardian at a particular time, and there is no evidence whatever that any disposition has been made of it, it is the province of the jury to decide whether it continued in her possession until a particular time afterwards.
7. But when a guardian is shown to have received money at a certain time, and there is also evidence tending to show that she had used it prior to a certain subsequent time, the presumption that it continued in her possession until such subsequent time cannot be drawn, either by the court, or by the jury, for the purpose of charging a surety with it.
8. A guardian who has acted as such for only seven months, will not be charged with the amount of a debt due from a preceding guardian, on the ground of neglect in not having collected it, when it is shown that the sureties of the former guardian, who are bound for it, are entirely solvent.

ERROR to the Probate Court of Lowndes.

ELMORE and JUDGE, for plaintiffs in error:

Guardians' accounts and settlements are placed on the same footing as those of administrators.—Clay's Dig. § 27, 226; ib. § 38, 304; ib. § 42, 304.

Settlements of Harrison and Larkins, in October, 1840, were

defective, and were not evidence, and the same as to that of Harrison, in October, 1840.—Ashley v. Ashley, 15 Ala. 75; Willis v. Ashley, 16 Ala. 652.

Principals in bond are liable for each other's acts as sureties, and are primarily liable before their sureties.—Little v. Heard, 16 Ala. 358; Little v. Knox, 15 Ala. 576; Kavanaugh, v. Thompson, 16 Ala. 817-823.

The presumption is, that she had this money, and brought it into the joint guardianship.—Townsend v. Everett, 4 Ala. 607; Governor v. Robbins, 7 Ala. 79; Dumas v. Patterson, 9 Ala. 484.

The accounts filed, and Mrs. B's declarations, are part of the *res gestæ*, made while acting in the performance of an official duty.—Bondurant v. Bank of Ala. 7 Ala. 830; Townsend v. Everett, 4 Ala. 607.

An administrator is chargeable on his settlement with a note due by him to his intestate.—Duffie v. Buchanan, 8 Ala. 27; Purdom v. Tipton, 9 Ala. 914; Childress v. Childress, 3 ib. 752.

The ward is entitled to a joint settlement, and of course a joint judgment against the guardians, for what was received by each, and Harrison is liable, whether there was a *devastavit* or not, because they are but the principal.—Kavanaugh v. Thompson, 16 Ala. 823; Little v. Knox, 15 Ala. 576; and the bond is not that administration.

Execution cannot issue against the sureties of deceased executor or administrator, on return of no property, where the settlement is made by the representative of the deceased executor or administrator.—Jenkins v. Gray, 16 Ala. 100.

Harrison is estopped from denying that he was sole guardian. Thompson v. Burdurant, 15 Ala. 346.

When there is no decree, a suit cannot be sustained against the sureties on the settlement.—Judge v. French, 3 S. & P. 263.

Unless there a is final settlement, or a partial one ordering distribution and refunding bond rendered, suit cannot be sustained against the sureties.—Judge v. Coalter, 3 S. & P. 348.

If assets are fixed in the hands of the administrator, and his inability to pay is shown, there is a devastavit, and the suit may be sustained against the sureties.—Judge v. Coalter, 3 S. & P. 348.

The death was a conversion, especially with insolvency.—Governor v. Stonum, 9 Ala. 679-684.

Where a minor at fourteen chooses a guardian, and it is allowed by the court, the previous appointment is tacitly superseded, and the guardian required to settle his accounts.—Kelly v. Smith, 15 Ala. 687.

Harrison cannot question his own appointment in a collateral proceeding. The former guardian could not do it except in a direct proceeding.—Speight v. Knight, 11 Ala. 464; Boyett v. Ker, 7 Ala. 9; White v. Brown, 7 Monroe, 446.

Where a former guardian has been appointed, the court cannot appoint another, unless the first has been renounced or revoked.—Bledsoe v. Burt, 6 Yerg. 458.

The ward might object, but not Harrison. Steele's appointment was then void, the joint guardianship being still in existence, and his act, as such, cannot affect the ward's rights.

Inventory is evidence of their acting as joint guardians; so also, the account filed, and the bond given.—This is evidence against them, but the inventory if evidence for them is only *prima facie*, which may be rebutted.

Where an administrator leaves the State, and the ordinary in South Carolina, grants letters to another, this in itself is a sufficient revocation of the former letters.—McLaurin v. Thompson, Dudley, S. C. 335.

A widow, executrix under the will, may decline acting, and yet be appointed administratrix with the will annexed, and act jointly with another administrator, and her acceptance of this latter appointment would not make her executrix in fact, but would be rather evidence of her renunciation; nor would the appointment of the administrator be void or irregular.—Briscoe v. Vickliffe, 6 How. 157.

Campbell, Bolling, Mays, and J. B. Stone, *contra:*

1. Defendant in error was cited by the Probate Court to settle his accounts as joint guardian, and also as sole guardian of Emily Browning, now Emily Williams. He has done so. He is not called upon in this proceeding for the acts and defaults of his co-guardian, Mrs. Elizabeth Browning, now deceased.

2. Joint executors, administrators and guardians are not liable for each other's acts at common law. They are liable only

for joint acts, and each is liable for his separate acts.—Stewart v. Connor, 9 Ala. 803; 11 Johns. R. 16.

3. It is only the giving a joint bond that makes them liable for the acts of each other. Quere—Does that? Harrison, by the joint bond, is only security for Mrs. Browning, if liable to that extent.—Boyd v. Boyd, 3 Gratt. 113; Kirby v. Turner, 1 Hopk. Ch. R. 309; Fonb. Eq. 468; 5 Johns. Ch. R. 296; 8 Leigh's R. 54; 15 Ala. 576. Being only security, he cannot be proceeded against without a decree and an execution returned "no property," against Mrs. Browning.—Judge County Court v. French, 3 S. & P. 263; Judge Limestone County Court v. Coulter, *et al.*, 3 S. & P. 348; Faulk v. Judge Monroe County Court, 2 Port. 538; Thompson v. Bondurant & King, 15 Ala. 346; Little, *et al.* v. Heard, *et al.*, 16 Ala. 358; Jenkins *et al.* v. Gray *et al.* 16 Ala. 100. A party pursuing a summary remedy must comply strictly with the requirements of the statute.

4. The account of Mrs. Browning filed on 2d September, 1839, is not evidence against Harrison. It was prior in time to the execution of the joint bond, though on the same day. It would at most be evidence only of the fact that the account was filed, and not of what it contained. It might, perhaps, be *prima facie* against her former securities—see 4 Ala. 607. As well might it be contended that the judgment by default in the fall of 1841, was an admission that the money was then on hand, as that Mrs. Browning had it, on the 2d of September, 1839. The mind cannot be satisfied from the evidence in the record that it was in her possession at either of those periods. The evidence should show affirmatively that it was in her possession during the joint guardianship.—9 Ala. 487; 1 How. 104; 1 McLean, 493; 5 How. 29; 15 Peter's 187; 9 Watts & Serg. 109.

5. To make the defendant liable in any proceeding, the $2,718 98-100 must have been on hand during the joint guardianship. The evidence shows sufficiently clear that the money was not on hand when the joint bond was executed, or after. Mrs. Browning kept up the family establishment, she loaned her son money, bought a negro at a high price, paid only a part of this debt when it fell due, she kept no separate account for her daughter, in fact kept no accounts for herself or daughter; she borrowed money from her son-in-law, Steele, soon after the mar-

riage with Larkins, which was in October or November, 1839; she contracted a debt shortly before her marriage, and one of her negroes was sold under execution after the marriage to pay it; she owed several other debts which she never paid, bought no property after the 2d September, 1839, for which she paid; Steele made out her accounts for the court. He made out the one filed 2d September, 1839. If she then had money on hand, he did not know it. Her other son-in-law, George Walker, knew of no money she had on hand on 2d September, 1839, or after. They both lived near her. At her death she had no money, neither had she notes for money loaned, either individually or as guardian. The debts contracted before the giving the joint bond, and the support of the family, &c., must have been paid—they are not presented to her executor.

6. Harrison is not liable on the ground of laches. He would not be required to collect the money in the short time he had to do it in, even if loss to the ward had been the consequence. Mrs. Browning was as solvent in the Fall of 1840, when Harrison resigned and turned over the property of his ward to Steele, who succeeded him as guardian, as she was before. Her securities on the former bond also continued solvent, and are now solvent. No injury has resulted by Harrison's not collecting the money.—See 15 Ala. 333; 6 Watts, 185.

DARGAN, C. J.—Elizabeth Browning being guardian of Emily Browning, now Mrs. Williams, on the 2nd day of September, 1839, returned to the Orphans' Court of Lowndes an account current, showing that she was then indebted to her ward in the sum of $2718 99-100. On the same day, she applied to the court to have Edmund Harrison appointed to act jointly with her as guardian, and upon her application, joint letters of guardianship were issued to the said Elizabeth and said Harrison, who thereupon entered into a joint bond in the penal sum of $30,000, with condition, well and truly to perform all the duties that were or might be required of them by law as such guardians. In October afterwards, a joint inventory was returned by the two guardians, but in this inventory, the sum returned by Mrs. Browning as due to her ward on the 2nd September, 1839, is not mentioned.

Mrs. Browning afterwards intermarried with Larkins, and

died insolvent without ever having accounted for this sum, and the object of this suit is to charge Harrison with its payment. This statement of the facts gives rise to the first two questions of law presented by the argument of the plaintiff's counsel. First, that guardians who enter into a joint bond faithfully to perform their duties as such, are liable for the acts and defaults of each other; and secondly, that they, or either of them, may be made to account in the Orphans' Court, for each other's defaults. Independent of all decisions, I should not hesitate to hold, that guardians who enter into a joint bond are liable for each other's acts. The condition of the bond is, that they shall well and truly perform all their duties as guardians. Now, if one fail to perform his duty as such, the condition is broken, and every party to the bond must be held liable, otherwise we should construe the bond not as a joint, but as a several obligation. I cannot conceive how the condition of a joint bond can be said to be broken as to one of the obligors, but not as to the other. To hold that it may, would be to construe it as the several bond of each, and not the joint bond of both.

But we think it is settled by the adjudged cases, that if two or more guardians, executors, or administrators, join in a joint bond for the faithful performance of their duties as such, they are liable for the acts of each other. In the case of Clark and Wife v. The executors of Williams, 6 Gill & John, 288. two administrators joined in a bond for the faithful performance of their duties, and the question was whether they were liable for the acts of each other. It was insisted that they were not, upon the common law rule, that one administrator was not liable for the *devastavit* of his co-administrator, unless he in some way contributed to its commission. But the court said that they could not adopt the construction attempted to be given to the bond, that it was the separate bond of each administrator in which the securities were bound for both, but the administrators not bound for each other. Had the administrators designed to place themselves in that attitude, they should have executed separate bonds.—In the case of Collins v. Carlisle, 7 B. Monroe, 15, the court of appeals of Kentucky say, that administrators who give a joint bond are liable jointly for the acts of each other. So in the case of Hughlett v. Hughlett, 5 Humph., 453, the Supreme Court of Tennessee, held that joint executors, exe-

cuting a joint bond with securities, are each responsible to creditors and distributees for the acts of each other. The same principle is admitted in the case of Brazier v. Clark, 5 Pick. 96; Bratten v. Bateman, 2 Dev. Equ. R. 115; Morrow v. Peyton, 8 Leigh, 54.—See also Little v. Knox, 15 Ala. 576. The only case I have seen that holds a contrary doctrine, is the case of Kirby and Wife v. Turner, et al. 1 Hopkins Ch. R. 309. It was held in that case, that guardians who had executed a joint bond were not bound for the separate acts and defaults of each other, but that they were jointly bound for their joint acts, and separately bound for their separate acts in which the other did not in any manner participate. This case denies that the joint bond alters the liability of joint guardians, and holds that it is the same that it was at the common law, or that it would have been if they had given each a separate bond for his own acts. I cannot, however, doubt, but this case is wrong, and I think the error is in this, that the condition of the bond, being that both will well and truly discharge their duties as guardians, it is broken, if one only makes default, and if the condition be broken, the obligors must be bound. We consider the correct rule to be, that guardians, executors, and administrators who join in a joint bond, are liable for the acts and defaults of each other, and if they would avoid responsibility for each other's acts, they must give separate bonds, or if but one bond be given, it must appear from the instrument that they did not intend to become bound for each other's defaults.—Perkins & Elliott v. Mayfield, 4 Ala. 417. The bond before us made the guardians liable for their joint acts, and also for the acts of each other from the time it was executed.

2. We think they may be compelled to account for each other's defaults in the Orphans' Court, (now called the Court of Probate.) Their liability arises out of the bond which they execute as guardian, and we do not think it can be denied, that this court has full jurisdiction to compel guardians to account to their wards for all debts or personal liabilities growing out of their character as guardian, and due from them to their wards. In the case of Duffie, adm'r. v. Buchanan & Wife, 8 Ala. 27, it was held that on a final settlement of an administrator's account in the Orphans' Court, he might be charged with the amount of a note due from him to the intestate, because it was assets in

his hands.—See also Childress v. Childress, 3 Ala. 752. We cannot distinguish these cases in principle from the case before us. Here the guardian is under a liability to his ward growing out of his bond as guardian; it must therefore be considered as a debt due from him as such, and he must be accountable in the Orphans' Court. But it is contended that the ward would not be entitled to a joint decree against her guardians, though bound for the acts of each other, and if not entitled to a joint decree, such liability cannot be enforced in the Orphans' Court. In the case of Kavanaugh & wife v. Thompson & wife, 16 Ala. 817, it was intimated by this court, that distributees were entitled to a joint decree against administrators, who had given a joint bond, which rendered them liable for each other's acts, but it was not necessary to decide the point in that case. Nor is it necessary to decide it in this, for whether the decrees should be joint or several in the first instance, we think it clear that when one guardian is dead, and his estate insolvent, the surviving guardian may be directly charged, not only with his own, but his co-guardian's defaults.

In conclusion, however, upon this question, we will add, that we do not perceive any valid objection to the practice of rendering a joint decree against joint executors, administrators or guardians, when they are jointly liable for the acts of each other. But as it is not indispensably necessary to decide that point, it may be considered as an open question until the precise point is presented for adjudication.

Coming to the conclusion that joint guardians who have given joint bonds, intending to bind themselves jointly, are liable for the acts of each other, and that they may be compelled to account for each other's defaults in the Orphans' Court, the next inquiry is, whether the joint bond of Mrs. Browning and Harrison covers this sum admitted by her to be due in her return of the 2nd of September, 1839. It is admitted by the counsel of the plaintiffs in error, that if this sum of $2,718 had been converted by Mrs. Browning before that time, if she did not have the money on hand at the time of executing the joint bond, then this sum is not covered by it, for the bond does not bind Harrison for the defaults or acts of Mrs. Browning done or committed before its execution. The liability of Harrison for this sum, upon the bond executed jointly by himself and Mrs.

Browning, depends on the fact, whether she had used the money before the 2nd of September, 1839, when the bond was executed. To solve this question, we must look to the evidence alone. It must be admitted that the return made by Mrs. Browning on the 2nd September, 1839, showing this balance due her ward, is not evidence within itself against Harrison. But as Steele in his testimony states, that the account was made out by him as instructed by Mrs. Browning, and at her request, and that she then stated that she had received the amounts with which she charged herself from the sale of the crops of cotton, we must consider that there is proof that Mrs. Browning came into the receipt of the sums of money at the respective times and in the manner in which she charged herself. What Mrs. Browning said at the time of making out the account, is made evidence against Harrison, because it was brought out by him on the cross examination of Steele. This is the only evidence to show that Mrs. Browning ever received any money of her ward's with the exception of the further proof, that the cotton for the years 1835, 1836, 1837, and 1838, raised jointly by the labor of the slaves of Mrs. Browning and her ward, was sold by her. It is insisted that, as this evidence shows the money to have been once in the possession of Mrs. Browning, it is to be presumed that she retained it in possession as guardian, until the time of rendering her account, and the execution of the joint bond by herself and Harrison. I will not say that it would be improper to draw such an inference in the absence of all other proof, but to my mind, it would be a very weak and inconclusive presumption. In the case of the United States v. Myers, 1 McLean, 493, the question was, whether the securities of Peter Wilson, who was receiver of money at a land office, were bound for an amount that had come to his hands before the execution of the bond. That depended on the fact, whether the money had been converted before the bond was executed. The only evidence to charge the securities was his quarterly returns made to the Secretary of the Treasury, showing the balance in his hands; and it was contended that the presumption was, that the money continued in his possession until the bond was executed. Judge McLean, in the course of his opinion, said, "the receipt of the money by the receiver may be admitted; but suppose, as the fact probably was, that he applied it to objects of a private nature before

the execution of the bond; no one would contend that the sureties were liable. The default in this view was complete before the date of the bond, and there could be no liability on the sureties, unless the bond expressly provided for the case; and unless there had been more evidence before the jury, the defendant could not be charged with any part of this defalcation." He further says, in the same case, "if it had been shown that the whole or any part of the balance due at the date of the bond, came into the hands of the receiver subsequent to its date, or if it had been shown that the balance was in the hands of the receiver, not presumptively, but in fact, at the date of the bond, the surety would be liable. But there appears to have been no evidence before the jury, that the balance was in the hands of the receiver at the date of the bond, or that it came into his hands subsequently."

From this opinion, it appears that Judge McLean held, that the mere receipt of the money by the receiver prior to the execution of the bond, was not evidence as against the securities, that he had it on hand at the date of the bond. I do not, however, intend to assert the rule as broadly as was done by Justice McLean, for the inference of one fact from another is a question for the jury, and if a jury were to find even as against a security, that a sum of money was on hand at a particular time, and this by inference from the fact alone, that it had been received by the principal at a time prior, I should not be disposed to disturb their verdict, if there was no proof to weaken or rebut the presumption. But if the money had been received a considerable time prior to the point of time at which it was sought to show that the money was on hand, and they were to refuse to draw the inference, that it was on hand at this subsequent time, I should be entirely satisfied with their verdict, and would not set it aside. But when there are other circumstances in evidence tending to weaken this presumption, and showing a probability that the money had been used by the principal before the security became bound, it would then be wrong for a court or jury to draw the presumption against the probabilities of the case, for the purpose of charging a security. And we feel entirely satisfied from the facts and circumstances of this case, that the probability is, that the money was used by Mrs. Browning before the date of the bond. She paid the expenses

of the plantation on which her own and her ward's hands worked; she contracted debts for the purchase of property during the years 1836, 1837, and 1838, to the amount of about $2,000; she also lent her son $500; she had but seven or eight hands of her own, and Mr. Steele, who was her son-in-law, and who made out her accounts for her, states that she was illiterate, and kept no accounts of her own or her ward's affairs, and that he does not know of her having any money on hand at the time of making her return or since. I think it but a reasonable presumption, that if she had had the money of her ward on hand at that time, it would have been known to Steele, or that she would have informed him of it. Under these circumstances, and considering that the money must have been received from the crops of 1835, 1836, 1837 and 1838, it would be a rash presumption to say that Mrs. Browning had the money on hand at the date of the bond executed jointly by her and the defendant Harrison. It would be a presumption drawn from one fact, against the probabilities of the case arising from all the circumstances. We think the Judge of the Orphans' Court properly refused to draw it.

It is further insisted, that the defendant is liable for this debt under his individual bond as guardian given upon the removal of Mrs. Browning from office in March, 1840, because it was his duty to have proceeded against her and her securities upon her original bond executed when she was first appointed. We will not lengthen out this opinion by entering into the question, whether it became the duty of Harrison to proceed against her and her securities for the amount which she had admitted to be due to her ward previous to the issuance of joint letters of guardianship to her and the defendant, for the record shows that in October, 1840, the defendant resigned his office in writing, and Steele was appointed guardian in his stead, and that the securities of Mrs. Browning were then, and still are entirely able to pay this debt. A mere failure to sue from the time he became sole guardian until he resigned, which was about seven months, cannot subject him to the payment of the debt on the ground of neglect, the securities bound for it still being solvent.

We can discover no error in the record, and the decree must be affirmed.

RIVES, ADM'R. v. TOULMIN.

1. Debt on bond executed by defendant, payable to plaintiff as administrator of G. M. R. deceased. Defendant craved oyer of the condition which was set out, and pleaded several special pleas, each averring performance. The condition recited, that defendant, said G. M. R., and two others had become securities for one M. as receiver in a chancery suit, that M. had made default, and plaintiff, as administrator of G. M. R., had paid a certain amount on account of said default, and to secure the same had taken from M. his six promissory notes, (which are described,) with a mortgage on his real and personal estate. It then concludes, "Now, in the event the said M. shall fail to pay said notes, and the mortgaged property prove insufficient to pay the same on a sale thereof, and the said W. H. R. (plaintiff,) be unable to collect said notes of said M. at law, then shall I pay said W. H. R. one fourth of the final amount of loss he may sustain by reason of his paying up said default as aforesaid, then this obligation to be void," &c. The plaintiff replied the mortgage, with its objects and stipulations, and his sale of the property under a power contained in the mortgage, the proceeds to be applied to the aggregate sums mentioned in the notes; also, that he commenced suit against M. *to recover the aggregate amount of said notes, as he was authorized to do under the terms and stipulations of the mortgage*, and recovered judgment on which an execution was regularly issued and returned "no property found," and that said notes remain unpaid except to the extent of the money arising from said sale. Defendant craved oyer of the mortgage, and demurred to the replication. The mortgage recites all the facts which are recited in the condition of the bond, and provides that in the event said M. should fail to pay each of said notes at maturity, or within ninety days thereafter, then all of said notes should be forthwith due and payable, and plaintiff might forthwith commence suit at law, or in chancery, "for the recovery of the whole debt covered by said six notes." And in the event of such default, the mortgage contained a power of sale, the proceeds to be applied to the payment of said debt and interest, and the balance, if any, to be paid to said M. The notes, bond and mortgage were all executed on the same day. *It was held*,
   1. That the replication was substantially good.
   2. That the mortgage is to be taken as part of the subject matter of the contract shown by the condition of the bond, and as part of the condition in effect.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

THE plaintiff as administrator of George M. Rives, deceased, declared upon a writing obligatory, bearing date the —— day of ———, 1845, but averred to have been executed on the 1st day of September, 1845, whereby the defendant acknowledged himself to be held and firmly bound unto the plaintiff in the sum of twelve thousand dollars, to be paid to him.

The defendant craved oyer of the condition which was set out, and filed five pleas, each concluding with an averment of performance. The condition was in these words: "The condition of this obligation is such, that whereas I, the said Theophilus L. Toulmin, George M. Rives, deceased, John K. Collins and Jacob Baptiste, became securities of William Magee, as receiver in a suit in chancery, in which the trustees of the Bank of the United States in Pennsylvania are plaintiffs, and the heirs and representatives of Henry Hitchcock, deceased, are defendants, and said William Magee has made default as such receiver, and said William H. Rives, as the administrator of George M. Rives, has paid on account of such default the sum of $32,722 54, and with the view to secure the same from the said Magee, has taken his notes with a mortgage on his personal and real estate, one of said notes being for $5,671 90, dated the 1st of September, 1845, due the 1st of September, 1846, bearing interest from the date; the five others of said notes being respectively for the same amounts, all bearing interest from the date, one due September, 1847, another September, 1848, another September, 1849, another September, 1850, and the last September, 1851; now, in the event the said William Magee shall fail to pay said notes, and the mortgaged property prove insufficient to pay the same, on a sale thereof, and the said William H. Rives unable to collect said notes of said Magee at law, then shall I, the said T. L. Toulmin, pay said William H. Rives one fourth of the final amount of loss he may sustain by reason of his paying up said default as aforesaid, then this obligation to be void, otherwise to remain in full force and effect."

The mortgage was also set out on oyer. Besides what is stated in the condition of the bond, the mortgage contains a power of sale, after mentioning the said notes, which it was intended to secure, and stating the aggregate amount to be $34,031 40, and that in the event said Magee should fail to pay each of said notes at maturity, or within ninety days thereafter, then all o'

said notes should be forthwith due and payable, and the plaintiff might forthwith commence suit at law or in chancery "for the recovery of the whole or entire debt covered by said six promissory notes." And in the event of such default, there was a power in the mortgage to the plaintiff to sell the property mortgaged, the proceeds, after paying expenses, to be applied to the payment of said debt and interest, and the residue, if any, to be paid to said Magee.

The first plea averred performance.

The second alleged a sale of the property by the plaintiff, and that he thereby raised money to pay the said first notes, and that the plaintiff had not, since the maturity of the third note, commenced any suit at law against Magee for the collection of that note, nor made any effort to collect the same, nor been unable to do so.

The third plea alleges a default in the payment of the first note, and a sale, for the purpose of paying the same, of the property mortgaged, for the sum of $12,000; that after the payment of the two first notes, the plaintiff failed to proceed at law against Magee for the collection of the notes, but has refused to do so.

The fourth plea alleges that the plaintiff has not sold the property mortgaged, nor attempted to collect the notes.

The fifth plea alleges, that after maturity of the first note, the plaintiff sold the property mortgaged for the sum of $11,231 18; also, that at the Spring Term of the Mobile Circuit Court, 1847, he commenced suit against Magee upon the original consideration of said notes, and at the Spring Term, 1848, recovered judgment for $41,245 90 and the costs; that an execution issued from this judgment and was returned "no property found;" also, that no other suit at law had been commenced against Magee, on account of said debt, and that the plaintiff had made no other attempt to collect the same, nor shown his inability to do so.

The plaintiff replied the mortgage, with its objects and stipulations; also, his sale of the property under the same, after default, for the sum of $11,221 18, besides the expenses, to be applied to the aggregate sums mentioned in the notes; also, that he commenced suit against Magee, to recover the aggregate amount of all of said notes, as he was authorized to do under

the terms and stipulations contained in said deed of mortgage, and recovered judgment, in May, 1848, in the Circuit Court of Mobile, for the sum of $41,245 98, besides costs; also that an execution was regularly issued and returned "no property found;" also, that said sums remain unpaid, except to the extent of the money arising from the sale.

The defendant demurred to the replication, and the demurrer was sustained, which is now assigned as error.

ELMORE & YANCEY, for plaintiffs in error:

1. All the pleas are, in substance and effect, pleas of performance, and the replication is an assignment of the breach of the condition.—1 Chitty on Pl. 585.

2. The replication sustains the declaration, and after the condition of Toulmin's bond is set forth on oyer, discloses the only state of facts on which the defendant was liable.

3. All these instruments are made at the same time, and refer to each other, and relate to the same matters, and constitute one transaction, and are to be determined as if embodied in the same instrument; and Toulmin was bound by the agreement that on default of Magee, &c., the plaintiff might sue him at once, on all the notes.—Sewall v. Henry, 9 Ala. 24; Elliott v. McClelland, 17 ib. 206; Dillingham v. Estis, 3 Dana 21.

4. The two first notes were due when Rives commenced his suit against Magee, and a balance due on them, even after applying to them the whole of the proceeds of the sale of the mortgaged property. These two notes were part of the foundation of the judgment, and to the extent of the balance due on these two notes, Toulmin was unquestionably liable.

JOHN A. CAMPBELL, *contra*:

1. The liability of the defendant arose upon the bond on the occurrence of three conditions. 1. That the mortgaged property must be exhausted. 2. Magee must have failed to pay the notes. 3. That the notes could not be collected at law.

The bond refers to the debt simply as it appears from the notes. It does not refer to the debt as indicated by notes and covenants in a mortgage. There is no evidence in the bond, nor is there any averment in the pleadings, that the defendant had

any notice of those covenants. The credit given to Toulmin is to extend to 1851. He is only to pay the amount of loss that should be finally ascertained. He is to have but one settlement with Rives. That is to be made after the loss was finally ascertained.—19 John. 69; 1 Wend. 457; 4 Cowen 173; 6 Cowen 624; 11 Wend. 105.

2. The suit upon the whole debt avoided the obligation.—2 Keen 638; E. C. L. R. 64.

PARSONS, J.—The notes were payable at certain times, as they originally were, the last one maturing September, 1851. The notes and the bond were made the 1st of September, 1845. The day when the bond was executed is averred in the declaration, and the date of the notes is stated in the mortgage. The mortgage is dated September, 1845, but it must have been executed on the first of that month, because it is mentioned in the condition of the bond. For the sake of convenience, we will assume for the present, but endeavor to prove in the end, that the mortgage is to be taken as parcel of the subject matter of the contract, which is shown by the condition of the bond, and, in fact, as part of the condition, in effect. The plaintiff's right of action on the bond, both as to time and amount, was subject to three conditions precedent, specified by the condition itself, to wit: that Magee should fail to pay said notes; that the mortgaged property should prove insufficient to pay the same on a sale thereof; and lastly, that the plaintiff should be unable "to collect said notes of said Magee, at law." It appears by the replication, that Magee failed to pay, and that the mortgaged property was sold, and was insufficient. It also appears by the replication, that the plaintiff brought suit against Magee, in the Circuit Court of Mobile, to recover the aggregate amount of all of said notes, and, in May, 1848, recovered judgment for the sum of $41,245 98, and the costs, and that an execution was regularly issued and returned "no property found." The case must turn upon the question, whether or not this suit was according to the contract of the parties, as it appears by the condition of the bond? They intended either that a suit or suits should be brought on the notes, without regard to any thing contained in the mortgage, by which the time of payment of the money mentioned in the notes was changed, or they intended that a suit, if

necessary, should be brought for the aggregate amount of the notes, under a stipulation contained in the mortgage, which is as follows: "And should it so happen that any of said notes, or any part thereof, shall remain unpaid for the space of ninety days after the same shall become due, and payable, then and in that event, each and all of said notes shall become due and payable, notwithstanding some of them shall have a longer time to run before maturity upon their face; and said William H. Rives may forthwith commence suit at law, or in chancery, for the recovery of the whole or entire debt covered by said six promissory notes." All deeds are to operate according to the intention of the parties, unless that is unlawful.—Goodtitle v. Bailey, 2 Cowp. R. 597. And it is proper to look to the subject matter of a contract, and the inducements that led to it, for the purpose of ascertaining what the parties intended.—Bates & Hines v. The Bank of the State of Alabama, 2 Ala. 451. Now, the circumstances of the contract were these: that the plaintiff's intestate, and the defendant and others, were securities of Magee for a large amount, which the plaintiff had paid. To secure this, the plaintiff, as the intestate's administrator, took Magee's notes, payable at different times, and his mortgage on real and personal estate, to secure the payments, with a provision in the mortgage, that in the event of a default for ninety days after maturity of either of the notes, a suit might be brought for the entire debt. It follows that, according to the mortgage, the entire debt for which the notes were made was to become payable at the time when such default should happen. In view of this, and for the purpose of securing the defendant's share of the loss, he executed the bond. The language of the condition is, it is true, that Magee's failure "to pay the notes," and the insufficiency of the mortgaged property "to pay the same," and the inability of the plaintiff "to collect said notes of said Magee, at law," are the contingencies upon which the defendant was to pay "one fourth of the final amount of the loss." But if the language had been to pay the money mentioned in the notes, and to collect the money mentioned in the notes, the intention would have been the same. Either way, however, it is reasonably clear, we think, that the parties looked to a payment or collection of the notes, or of money mentioned in the notes, not according to the tenor and effect of the notes, but according to the provision of the mort-

gage. The plaintiff's right of action for the whole, when any default might occur, was plainly provided for by the mortgage. It could not have been the intention or expectation of any of the parties that the plaintiff might sue for the whole debt and recover according to the mortgage, and afterwards, for the purpose of reaching the defendant, have to sue again upon the notes. Such unnecessary and unauthorized litigation, delay and expense, were intended, or it was intended that upon the contingencies which have happened, one suit for the whole amount should suffice, and this last is our opinion, and therefore, we think the replication was substantially good, and that there was error in sustaining the demurrer. Upon this view of the case, the authorities cited by the defendant's counsel do not apply.

2. It appears by the condition that the notes and mortgage were in existence when the bond was executed, and it is to be presumed that they were before the parties, for each of them was recited in the condition and was part of the subject matter of the contract, which is evidenced by the bond and its condition. Some of the authorities upon this point are collected in 2 Cowen & Hill's Notes, p. 517–518, (edition of 1850.) It is there said that where one writing refers to another, either tacitly or expressly, both are to be construed together; and one may correct an erroneous description contained in another, or even vary, or add to, as well as explain it. And it is further said, that "two writings executed at the same time, in relation to the same subject matter, have, in many cases, been deemed one instrument, with a view to the construction of either." In Jackson v. Parkhurst, (4 Wend. 374,) one deed referred to another, and the court said the latter, by the reference, became part of the former; and in Sewell v. Henry, (9 Ala. 30,) the then Chief Justice of this Court made a similar observation, that "two writings, connected by a reference of one to the other, may be considered and construed as parts of an entire transaction, and as if they were embodied in one instrument." In Habergham v. Vincent, (2 Ves., jr., 203,) the Lord Chancellor observed: "I cannot conceive but that a will may be good by reference to some other paper, no matter what. When the thing referred to is ascertained, it is as much a part of the will, as if it was within the sheets. I remember one case, where a woman devised her estate to the same uses to which her husband had devised by his will. The conse-

quence was, his will became hers. Her will passed her estate, but to know what was done, it was necessary to refer to the other will." In the same case, Mr. Justice Wilson, who sat with the Lord Chancellor, said: "I believe it is true, and I have found no case to the contrary, that if a testator, in his will, refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper makes part of the will, whether executed or not; and such reference is the same as if he had incorporated it, because words of relation have a stronger operation than any other; as Lord Coke says in his comment on Littleton, when Littleton is speaking of the word 'heirs' being necessary to raise an estate of inheritance, Lord Coke makes this exception: if A enfeoff B and his heirs, and B enfeoffs A in as full and ample a manner as A has enfeoffed him, that will give the inheritance without the word 'heirs,' and it shall have effect by relation." This principle, therefore, is not confined to wills or any other particular instrument, but in reason and justice may apply to all—to deeds of feoffment and other instruments.

The husband's will, in the case mentioned by the Lord Chancellor, became part of the wife's, not in consequence of the relation between them, but because she had referred to his.

In the case before us, the mortgage was part of the subject of the contract. The amount of Mr. Toulmin's liability was to depend on it, and the contract gave him an interest in it. It was so fully mentioned in the condition of his bond, that it could be readily identified, and in fact, its identity is not controverted. And not only the amount, but, as we think, the time of his liability, was to depend upon it, or rather, upon a suit and other proceedings authorized by it. As to the suit upon the event of which his liability, in respect of time and amount, was to become fixed, we only limit the general language of the condition of the bond, by the more specific language of the mortgage, which we take as part of the condition. We do this to carry out what we think was the plain intention of the parties.

The judgment is reversed and the cause remanded.

Dargan, C. J., not sitting.

REPORTS

OF

CASES ARGUED AND DETERMINED

AT JUNE TERM, 1851.

LAND & WIFE *vs.* COWAN, *et als.*

1. If the complainant is not entitled to relief upon the original bill, matters which subsequently occur, and which are averred by way of supplemental bill, cannot cure the defect.
2. When a remainder man files a bill *quia timet*, to protect his interest in certain slaves, an allegation in the bill that one of the defendants seized upon, and took possession of the negroes, from and out of the possession of the tenant for life, and that he has ever since exercised, and claims to exercise full control over them, and has placed them in the possession of another defendant, who still retains them, does not warrant the presumption that he took them as a trespasser, or that he holds them otherwise than in subordination to the true title.
3. A remainder man cannot complain of a trespass upon the tenant for life, unless such trespass in some way endangers his remainder.
4. Every fact essential to entitle the complainant to the relief which he seeks, must be averred in the bill, and relief cannot be granted for matters not alleged, although they may be apparent from other parts of the pleadings and evidence.

ERROR to the Chancery Court of Cherokee. Tried before the Hon. D. G. Ligon.

J. B. MARTIN, for plaintiffs in error.

A. WHITE, *contra.*

CHILTON, J.—When this case was argued at the bar, it occurred to me that the decree of the chancellor could not be supported; but upon looking more narrowly into the record, I am satisfied that his decision was correct.

It is proper in the outset to remark, that if the record shows that the complainants were not entitled to relief upon the original bill, the matter which subsequently occurred, and which is averred by way of supplemental bill, does not cure the defect.—Hill v. Hill, 10 Ala. 527.

The complainants insist, that under the will of Nathan Sanders, Mary, his widow, was entitled to the property in controversy during her life or widowhood, and that upon her death or subsequent marriage, the absolute property would vest in them in right of complainant Elizabeth. The bill is one filed *quia timent*, to protect the remainder, and the danger to the remainder which is averred by the complainants is, that the property will be taken without this State. This ground, which is asserted upon information and belief, is wholly unsustained by the proof, while it is expressly denied by the answer.

Failing in this, the counsel for the complainants throws himself upon another ground, namely, that there has been a sale fraudulently made of the entire property, and that Cowan insists upon the entire right to said slaves as administrator of John Gibson's estate, by virtue of a bill of sale made by Mary Sanders to said Gibson, conveying said slaves to him; and he supposes the case is brought within the decision of Lyde, et al. v. Taylor, et al. 17 Ala. 270, where we held that "when a tenant for life has conveyed the slaves absolutely to different persons, who claim the entire title and deny that of the remainder men, a court of equity will interpose, and secure to them the future enjoyment of their rights." Now, that the record shows facts sufficient to bring the case within the influence of this and kindred decisions there can be no reasonable doubt; but we have read the bill over and again, to ascertain where the bill of sale by Mrs. Sanders to Gibson, and the assertion of a hostile title to that of the complainants under it, or under any other pretence of right, is alleged in the bill, and we confess we have been wholly unable to find that any such allegations are contained in it. It is true, there is an averment to the effect, "that by some means or other, the said negro woman and her children were

fraudulently purchased from the said Mary Sanders, without consideration; and a bill of sale obtained fraudulently from the said Mary to said negroes." Now whether said bill of sale has ever been set up as valid, whether indeed it is outstanding, to whom it was given, or who has it, are all matters upon which the bill is silent. There is no averment in any way connecting the defendants Cowan and Hollingsworth with said bill of sale, nor the least intimation given by the pleader, that either of them claims to hold under it.

It cannot, we apprehend, be seriously contended that the bare fact of some one having fraudulently obtained a bill of sale from the tenant for life at some time, can give a right of action against these defendants, who, for aught appearing in the bill, are total strangers to the transaction. Such pleading is not to be encouraged, for a defendant could never tell what he is to answer. We may then lay the bill of sale out of the way, and proceed to the other grounds of alleged jurisdiction.

It is supposed that the assertion of a hostile right to the property on the part of Cowan gives to those entitled in remainder the right to the protection of the court. If we concede this, still the bill is wholly defective in the averment of any such assertion of right. It says, "that Robert S. Cowan in 1839 or 1840 seized upon and took possession of the said negro woman Eve, and of her children above named, from and out of the possession of the said Mary Sanders, and has ever since exercised and claims to exercise full control over the same, and has placed said negroes in the possession of Thomas Hollingsworth, who has them now in his possession." This averment, which is the only one as to the manner in which the slaves were taken and held, constitutes no ground for resorting to a court of equity. It does not negative the idea, that Cowan may have lawfully seized them; *non constat*, Mrs. Sanders who had the right to them, until her marriage or death, may have hired them to him, or have sold her interest in them to him; at all events, we should be going a great length to presume that he took them as a trespasser, and without right, when the pleader who knew or could have known the facts so material to his case, has failed so to state it. Neither are we authorized to presume that Cowan holds them otherwise than in subordination to the true title, since this presumption is consistent with the facts al-

leged. The pleader does not charge that he (Cowan) sets up any title to these slaves, but only that he has exercised and claims to exerese full control over the same.

If Mrs. Sanders was entitled to the possession when this bill was filed, she might well have vested her right of possession in Cowan; but if he trespassed upon her right, unless such trespass in some way endangered the remainder which ultimately belonged to the complainants, they had no cause of complaint. It was a matter solely between Mrs. Sanders and Cowan, in which they (the complainants) had no interest or concern whatever.—Nance v. Coxe, 16 Ala. 125. So that upon the case made by the bill, the allegation of danger from the removal of the property out of the way, as not sustained by a particle of testimony, the complainants have not the semblance of equity on which to rest their claim for relief.

This being the case, we deem it unnecessary to go into the proof and answers; for it is but common learning that every fact essential to entitle the complainant to the relief which he seeks must be averred in the bill, and that relief cannot be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence.—See upon this point, Story's Eq. Plead. § § 257, 28; 1 Bro. C. R. 94; 6 Johns. R. 565; Cooper's Eq. Plead. 5-7; 11 Peters, 229; 11 Ves. 240; 3 Wend. 584; 7 Wheat. 522; Daniel's Ch. Pr. 411, n; Mitf. Plead. 71 n 2; 16 Ala. R. 793; 15 ib. 634; 13 ib. 681; 11 ib. 960; 6 ib. 518; 3 ib. 421; 1 ib. 330; 8 Port. R. 211; 5 ib. 343; 4 ib. 306; 3 ib. 470; 3 Stew. R. 243. The sale to Gibson, and claim of title by his administrator, are not the causes set up by the bill for relief, but the threatened removal of the property.

Let the decree be affirmed.

McKINLEY *vs.* WINSTON.

1. Courts of equity put the same construction on the statutes of set-off, in the absence of all intervening equities, as do the courts of law.
2. In an action to recover a debt due from the defendant to the plaintiff individually, the defendant cannot set off a debt due from the plaintiff to a firm in which they are both partners.

ERROR to the Chancery Court of Lauderdale. Tried before the Hon. D. G. Ligon.

PRYOR, for plaintiff in error.

ORMOND & NICHOLSON, *contra.*

DARGAN, C. J.—Winston brought a suit at law against McKinley to recover a debt due to him by McKinley individually. McKinley, by his original and amended bill, seeks to set off against this debt a demand due from Winston, as the bill alleges, to a company composed of McKinley and Winston, and several others. This is the object and substance of the bill, and we cannot doubt but it was properly dismissed; for, independent of all other objections, we think it clear that in the absence of all other intervening equities, one debt cannot be set off against another, unless they are *mutual debts;* that is, debts due to and from the parties in the same right. Courts of equity put the same construction on the statutes of set off, as do courts of law, and if there is no equity going beyond the statutes, to entitle a party to have one debt set off against another, it must be shown that they are mutual debts, such as could be set off, the one against the other, under the statute at law, if the controversy were properly pending in that forum. In the case of Blagden, *ex parte*, (19 Ves. 465,) the petitioner was indebted to Hearn, a bankrupt, who was indebted to the wife of the petitioner before the marriage. The object of the petition was to set off the debt due to the wife, *dum sola*, against the debt owing by the husband to the bankrupt. The Chancellor said "it must be a strict set off at law, or a case of mutual debt or credit, but here is no pretence for a set off at law, nor is it a matter of set off in equity; for if the petitioner had sued alone, this court would have required the wife as a party." The same principle is fully

recognized by Judge Story, in his work upon Equity Jurisdiction, vol. 2, 657; see also Green v. Darling, 5 Mason 207–208; 11 Ves. 27. I deem it unnecessary to refer to authorities, to show that the debt due from Winston to the company of which the complainant was a member, could not be set off by him, against a debt he owed individually to Winston; and, as it is manifest that there is no equitable ground going beyond the statute of set off, that entitles the plaintiff to have this demand due by Winston to the company set off against the debt he owes to Winston, the bill was properly dismissed, and the decree must be affirmed.

TATUM & SMITH *vs.* MORRIS.

1. Trespass is the only remedy for damage occasioned to the plaintiff by the malicious act of the defendant in causing an execution issued against a third person to be levied on property belonging to the plaintiff.
2. An action does not lie to recover damages for the malicious act of the defendant in suing out an injunction against the plaintiff, until the injunction is finally disposed of, or until the suit in which it was sued out is terminated.

ERROR to the Circuit Court of Coosa. Tried before the Hon. Geo. D. Shortridge.

THIS was an action of trespass on the case by Tatum and Smith against Morris. The declaration contained three counts. The first and third counts, which are substantially the same, charge the defendant with "causing and procuring the Sheriff of Autauga County to levy an execution against one Stephen Shelton, on certain slaves, the property of the plaintiff, and to take possession of and carry them away," with intent to cause it to be suspected and believed that plaintiffs had no title to said property, and to hinder and prevent them from selling the same, whereby plaintiffs sustained great damage, &c.

The second count charges that the defendant, wrongfully, &c., with intent to injure plaintiffs, caused and procured a writ of injunction to be issued from the Chancery Court at Wetumpka, restraining plaintiffs from paying over certain sums of money in their hands, collected from an assignment of certain property to them by said Shelton, whereby they sustained great damage, &c. The court sustained the defendant's demurrer to each count in the declaration, and this is now assigned as error.

Elmore & Yancey, for plaintiffs in error:

1. Case is the proper remedy for an injury done under process legal and regularly issued.—1 Chitty's Pl. 139; Luddington v. Peck, 2 Conn. 700; Brunscomb v. Bridges, 1 Barn. & Cress. 145; Hayden v. Shed, 11 Mass. 500; Beck v. Broadbent, 2 Durn. & East, mar. page 183; Beatty v. Perkins, 6 Wend. 382; Watson v. Watson, 9 Conn. 141; Turner v. Walker, 3 Gill & Johns. 385; 5 East 304. These cases, though the facts are different, all establish the same principle, viz: that case, and not trespass, is the remedy when process is regularly issued by a court of competent jurisdiction, and an injury is done under it by its illegal use. It makes no difference whether the person so abusing the process is a party to it or not.

2. When a party has sustained both general and special damage from a trespass, or immediate and consequential damage, he may waive the special or consequential damage, and proceed for the general damage only. If he can do this, there is no reason why he may not waive the immediate damage and proceeed for the consequential. It has been decided, that when the special damage is not the immediate consequence of the force, the trespass may be waived and case maintained.—Pitts v. Gaines *et al.*, 1 Salk. 10; Muskett v. Hill *et al.*, 5 Bingham 694; Gelson v. Fisk, 8 N. Hamp. 404. If the damage be consequential, the party may sue in case, or in trespass with a *per quod.*—1 Chitty's Pl. 127. It has been further decided, that when there is both an immediate and a consequential injury, both actions may be maintained; and the plaintiffs being entitled to both must have their election to proceed in either.—Harker v. Birkbeak, 3 Bur. 1561; McAllister v. Hammond, 6 Cow. 345. It has also been decided, that in cases of negligence when the injury is immediate, the party has an election to treat the negligence as

the cause of action and declare in case, or consider the act itself as the injury and declare in trespass.—Blin v. Campbell, 14 Johns. 432; 6 Cowen 342; 3 N. Hamp. 465; 10 Wend. 324; Williams v. Holland, 6 Carr. & Payne 23; 2 Black. R. 897.

The declaration in this case does not make the levy and seizure of the slaves the gravamen of the action, but the abuse of the process.

3. The cause of action accrued when the tortuous act was done, and when the consequential damage ensued.—Granger v. George, 5 Barn. & Cress. 149; Peter v. Kendall, 6 ib. 703; 3 Barn. & Ad. 448; ib. 626; 16 East 215.

4. The second count, averring the issuance and service of an injunction, is not bad for want of an averment that the injunction was dismissed: because the action in this case is not for the suing out of the writ, but for the malicious use of the process, and therefore involves no question of probable cause for suing it out.

White & Parsons, *contra:*

1. It is insisted that each of the three counts discloses a cause of action for which trespass is the only remedy, "and the motive, intent, or design of the wrong doer cannot change it."—See 1 Chitty's Pl. p. 130, margin.

Lord Chief Justice Ellenborough says: "The true criterion seems to be, according to what Lord Chief Justice DeGrey says in Scott v. Sheppard, (3 Wills. 403,) whether the injury received by the plaintiff was by force from the defendant. If the injurious act be the immediate result of the force, originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass, *vi et armis*, by all the cases ancient and modern, and it is immaterial whether the injury be wilful or not.—Leame v. Bray, 3 East 598; Wilson v. Smith, 10 Wend. 327-8; Percival v. Hickey, 18 ib. 284; see also 1 Chitty's Pl. p. 125–6–7–8.

2. So also is trespass the remedy, where one directs the sheriff to levy particular goods, not the property of the defendant in the action.—1 Chitty' Pl. 180; Phillips & Brown v. Hall *et al.* 8 Wend. 610; Wall & Wall v. Osborn, 12 ib. 39; Smith v. Shaw, 12 Johns. 257. Again—"where process has been misapplied, as where A, or his property, has been taken upon process against B., trespass is, in general, the only remedy."—

1 Chitty's Pl. mar. 185; 2 Wils. 309; 2 Bla. R. 353. The cases on which counsel for the plaintiffs in error rely, are clearly distinguishable from this case in principle. It will be found on examination, that all or nearly all are for the abuse of process by one who is a party to it. This doctrine is not disputed, but it is inapplicable to this case, and such is the decision of the court in one of the cases referred to.—See Watson v. Watson, 9 Conn. 147. And where a justice issues a second execution after the first is satisfied, he is a trespasser.—Lewis v. Palmer *et al.*, 6 Wend. 367. But in this, as in all the cases, the doctrine is distinctly recognized that the process is a protection to the officer executing it, so far as any trespass to the defendant is concerned.—See also to the same point, McGuinty v. Herrick, 5 Wend. 240; Turner v. Walker, 3 Gill & John. 385–386.

3. The second count is defective for several reasons, and the attention of the court is invited to them, in connection with the general principles heretofore relied on, as to the first and third counts. 1. There is no averment by whom the bill in chancery was exhibited at Wetumpka. 2. It is not shown that the chancery suit is ended; for aught that appears, it may be still in progress, and the ultimate decision of the chancellor in favor of the complainant. 3. There is no sufficient averment that the property was not liable to the claim set up by the bill—the facts connected with it are not set forth at all—a mere legal conclusion is all the count contains on this point. 4. The remedy for the wrongful exhibition of the bill, and the process granted under it, is by action on the bond. In suits commenced by attachment, but for our statute, no suit could be brought to recover damages until the attachment suit is ended. This statute provision does not extend to injunction bonds.

PARSONS, J.—The first and third counts are so nearly alike, that our opinion upon the first will be decisive of the third. It is stated in the first, that one Shelton, by his deed, conveyed the property to the plaintiffs, in trust for the payment of his debts; that the defendant afterwards caused the sherifi to levy an execution, which was against the estate of Shelton, upon the slaves that were conveyed, and to take them away. It is fully alleged that this was done maliciously, for the purpose of causing it to be suspected and believed, that the plaintiffs had

no title to the real and personal estate conveyed by the deed, and of hindering a sale thereof, which the plaintiffs were about to make, and otherwise would have made, and that a sale was, at the time, prevented; and consequential damage in a sale of the land and slaves that was finally made is alleged.

The declaration is in case, and the question is, whether trespass was not the only proper action?

The levy and seizure of the slaves was a wilful act, and the force was immediate. It is very unlike the cases, in some of which it has been held, that the injured party may bring either trespass or case for an injury caused by negligence in navigating ships or driving carriages, for here the force was immediate and the act was wilful; and it is distinguishable from the case of an illegal distress, since in this case there was not the semblance of authority for taking the property of the plaintiffs under an execution against another person. Between these parties the execution was a nullity, and could not be pleaded as a justification, as it contained no command to take the property of the plaintiffs. If so pleaded, with an averment that the property in truth belonged to Shelton, the plea, I think, would be demurrable at the common law, as amounting to the general issue, though good, perhaps, under our statutes, which take away special demurrers. There may be cases, as stated in some of the books, where the injured party has an election to bring trespass or case, for damages that are immediate and consequential. Such cases must rest upon their own circumstances. But in this case, the plaintiffs certainly could have recovered all legal damages by declaring in trespass with the *per quod.*

"When process has been misapplied, as when A, or his property, has been taken upon process against B, trespass is, in general, the only remedy."—1 Chit. Pl. 185.

2. The second count is certainly defective. It contains no averment that the suit or proceeding in which the defendant procured the injunction, is ended or determined, nor that the injunction has been disposed of. Previous to this, an action for maliciously procuring the injunction is premature.

Let the judgment be affirmed.

HUGHES *vs.* HUGHES.

1. A divorce will not be granted for cruel, barbarous and inhuman treatment, unless there has been either actual violence committed, attended with danger to life, limb or health, or a reasonable apprehension of such violence.
2. Proof that the defendant was habitually intoxicated, that when drunk, he was a quarrelsome, turbulent, dangerous man, that he had used profane and abusive language towards his wife, threatening to inflict personal violence upon her, that he had endeavored to execute his threats by chasing her through the house and yard, and attempting to strike her with a chair, and that he had on one occasion inflicted personal violence upon her by kicking her, establishes a case of legal cruelty, sufficient to entitle the wife to a divorce.
3. A bill which charges the defendant's habitual intoxication, and his violence resulting therefrom as evidenced by his threats and abuse, "that he used the most gross and abusive language toward complainant, cursing her, and compelling her through fear of his violence to seek safety in quitting his presence, that he made threats of personal violence, such as would endanger her personal safety, as well as her life and limbs," and specifies particular instances of his misconduct, substantially alleges sufficient to entitle the complainant to the relief prayed, and puts the defendant in possession of the charges to be proved against him.
4. Acts of cruelty committed after a reconciliation revive the former cruelty, condonation being always conditional.
5. In suits for divorce, a sworn answer denying the allegations of the bill does not impose upon the complainant the necessity of establishing her case by two witnesses, or one witness with corroborating circumstances. The statute (Clay's Dig. 170, § 6,) merely contemplates a formal denial of the allegations of the bill, and does not require a sworn answer.

Error to the Chancery Court of Montgomery. Tried before the Hon. J. W. Lesesne.

Watts & Jackson, for plaintiff in error:

1. The proof shows that the defendant is guilty of cruelty in a legal sense, both in threats and kicking his wife.—Moyler v. Moyler, 11 Ala. 620; Otway v. Otway, 1 Eng. Eccl. R. 200; Hulme v. Hulme, 2 ib. 208-9; D'Aquilar v. D'Aquilar, 3 ib. 329; Shelford on Marriage and Divorce, (marg. p.) 425, 432 & 430.

2. One act of cruelty is sufficient.—Popkin v. Popkin, 3 Eng. Eccl. R. 325 and notes.

3. Condonation will not apply in this case.—Worsley v. Worsley, 6 Eng. Eccl. R. 249; condonation is not held as strictly against the wife as against the husband.—D'Aquilar v. D'Aquilar, *supra.*

4. Condonation must be pleaded in bar.—Beeby v. Beeby, 3 Eng. Eccl. R. 338; Dance v. Dance, 3 ib. 341 and notes.

5. After reconciliation, fresh acts of cruelty revive previous acts of cruelty.—Worsley v. Worsley, 6 Eng. Eccl. R. 249; Shelford on Marriage and Divorce, (marg. p.) 436.

T. WILLIAMS, *contra:*

1. A bill filed for divorce on the ground of cruelty, must set forth the facts which constitute cruelty.—Hill v. Hill, 10 Ala. 527. Therefore, the demurrer to the bill for this cause should have been sustained, and the bill dismissed at complainant's costs.

2. The proofs show that after many of the charges, the parties lived and slept together; this was condonation, and no proof of subsequent acts to revive the original cause of complaint.

3. The answer was sworn to, and denied the allegations; the answer should prevail, unless overturned by the ordinary proof required, which was not given.—The statute declares (Clay's Dig. 170, § 6,) that proof shall be required to support the allegations thereof, (the bill) as in cases where they (the allegations) are denied by the answer;" if allegations are denied by answer, then the answer prevails, unless overturned by two witnesses, or that which is equal to it.

CHILTON, J.—This was a bill filed by the plaintiff in error against the defendant for divorce *a vinculo matrimonii*, upon the alleged ground of cruel, barbarous and inhuman treatment, consisting of profane and abusive language, charging her with a want of chastity, threatening to inflict upon her personal violence, and to destroy her life, and in attempts to injure her person, which she avoided by escaping from him, and secreting herself; whereby her life has been endangered, and she kept in continual fear, &c. The bill also charges habits of intoxication upon the defendant, and that he has cruelly treated certain members of the family, children of the complainant by a former marriage.

The defendant in his answer fully denies the charges of cruelty, &c. made in the bill. Several witnesses were examined, and the chancellor upon the final hearing, deeming the proof of cruelty, &c. insufficient to warrant a decree for divorce, dismissed the bill. We entirely coincide in opinion with the chancellor, that the great rule which guides the court in cases of this kind has not been too strongly stated by Sir William Scott, in Evans v. Evans, 2 Hagg. Con. R. 35, and re-affirmed in Lockwood v. Lockwood, 2 Curtis's, 281, and by this court in Moyler v. Moyler, 11 Ala. R. 625. That rule is, that a divorce will not be granted for cruel, barbarous and inhuman treatment, unless there has been either actual violence committed, attended with danger to life, limb or health, or a reasonable apprehension of such violence. Guided by this rule, we have carefully examined the testimony, and we are compelled by the view we take of it to come to a conclusion different from that attained by the chancellor.

It is shown by all the witnesses who were examined, that the defendant for several years next preceding the separation, had abandoned himself to the constant habit of intoxication; that his language was unmanly, obscene, and often most profane to his wife. Mrs. Rebecca Hall proves, that on one occasion, he kicked her, having returned home drunk between midnight and day, in consequence of which she arose out of bed, and remained up all the remainder of the night apparently much excited. At another time shortly before their separation, he attempted to inflict personal violence upon her with a chair. Mrs. Cushing has seen him chasing complainant through the yard, and she much excited endeavoring to keep out of his way. She has found the complainant at late hours in the night in the kitchen, endeavoring to avoid the defendant, having the appearance of being very nervous, and afraid that he would inflict personal violence upon her. In the fall of 1848, it appears by this lady's testimony, the complainant had to take refuge in the cook house, and bar the doors, so as to avoid the defendant, looking as though she was much alarmed.

Howell B. Tatum proves threats of personal violence on the part of the defendant, and that he frequently cursed and abused complainant.

W. T. Moore, a witness examined on the part of the defendant,

proves that his habits unfit him for taking charge of the plantation, and that he was intoxicated the greater portion of his time; that upon one occasion when drunk, after abusing the complainant, he insulted a young man, a relation of hers, who had visited her sick son, and ordered him off the place, that they had a fight, and that defendant was afterwards put in prison on a charge of an assault with intent to kill, &c.; that complainant frequently left home through fear, and at one time under advice of counsel, sued out articles of the peace against her said husband, deeming it necessary for her protection. This witness further states that on one occasion when drunk, defendant ran the complainant through the house; that defendant appeared to be dangerous when intoxicated, and had no regard as to the weapons he would then use.

Mr. and Mrs. Greene, who went to reside with this family about the middle of November, 1848, and who remained three months, are examined by the defendant, and they testify that they saw no evidences of unkindness on the part of the defendant, either toward the complainant or the family. It will be remembered, however, that during their stay, Mr. Hughes was absent a portion of the time, (how long does not appear) in the State of Louisiana. Mr. Greene also states that the defendant indulged in the general habit of intoxication, and was considered when drunk a quarrelsome, turbulent and dangerous man. Many portions of these depositions were objected to by the defendant's counsel, but we think that granting him the benefit of every objection which can with plausibility be insisted on, enough remains to show that the conduct and treatment of Mr. Hughes to his wife was cruel in the legal sense of that term. In other words, it rendered the cohabitation unsafe, and placed her under reasonable apprehension of great bodily harm. The proof clearly presents him as having abandoned himself to the dominion of the grossest habits of inebriety; that his affections have become entirely estranged from his wife; that when intoxicated, (and the proof shows that he is almost continuously so, this habit having become so inveterate,) he is turbulent and dangerous; that he has threatened her, and attempted to execute his threats by pursuing her in the house, through the yard, and in attempting to strike her with a chair; more than this—he is presented as returning home amid the stillness of the midnight

hour, and instead of seeking seclusion in another room, as one not lost to a sense of shame and a decent regard for his family would most likely have done, he enters the bed chamber, and in a boisterous manner, abuses and kicks her. The proof presents a series of most unwarrantable conduct on the part of the husband, and if we leave out of view the proof of actual violence, there remains enough to show that this complainant cannot, without fear of such violence as will endanger her life, limb, or health, continue the matrimonial cohabitation with the defendant. But the whole case, in connection with the circumstances detailed by the proof in giving a history of it, (only a few of which we have stated,) in our opinion, clearly entitles the complainant to the relief which she prays by her bill.—Otway v. Otway, 2 Phillimore 95; (S. C. 1 Eccl. R. 200;) Evans v. Evans, 1 Hagg. 38; Moyler v. Moyler, 11 Ala. 620. The deportment of the defendant, coupled with his disposition and intemperate habits, affords the complainant just ground to apprehend such personal danger as to render the discharge of the marriage duties impracticable on her part. It may be that all this is the result of intemperance. We believe it is; but if men will indulge in habits which lead to such enormities, they must suffer the consequences.

We confess that we have had some difficulty in arriving at the conclusion, that the bill before us sufficiently sets forth the facts which constitute the cruelty complained of. It is not sufficient to set forth the *conclusion* that the conduct of the party was cruel, barbarous and inhuman, but the bill must state the facts which constitute such cruelty, barbarity, or inhumanity.—Hill v. Hill, 10 Ala. 527.

This bill charges that the defendant has made threats of personal violence, "such as would endanger her personal safety, as well as her life and limbs." It then proceeds to give instances of his conduct, coupled with threats, by reason of which she was compelled to leave his house for safety, and seek refuge in the kitchen among the servants, and other places. It also charges the defendant with using the most gross and insulting language, cursing the complainant, and compelling her, through fear of his violence, to seek safety in quitting his presence; and these facts are charged as a few of the numerous instances of a like kind, which frequently occurred. His habits of intoxication are also

charged, and his violence resulting therefrom, as evidenced by his threats and abuse, is stated, in consequence of which, for several years, she has been kept in a state of constant alarm, and well grounded fear of personal injury. Now, although we think the allegations might have been more specific in stating the character of the threats, yet we are not prepared to hold that the bill is so defective as to require that it should have been dismissed for that reason. It is stated that they were threats of *personal violence*, and such as compelled her to flee for safety, &c. The bill is certainly inartificially drawn, but we think it substantially alleges sufficicient to warrant the relief, and puts the defendant in possession of the charges to be sustained by proof against him.

We think there is no ground for holding that the cruelty complained of has been condoned. Conceding that there was a reconciliation after most of the alleged cruelty had transpired, yet it is shown that it was renewed and kept up until 1849, when the separation took place. It is well settled that fresh acts of cruelty, after a reconciliation, revive the former cruelty, condonation being always conditional.—Worsley v. Worsley, 2 Lee 572; S. C. 6 Ecc. R. 249.

The position that the sworn answer puts the complainant upon proof of the allegations denied, by two witnesses, or one witness with strong corroborating circumstances, cannot be maintained. This was so decided in Moyler v. Moyler, 11 Ala. 620. The statute manifestly contemplates that the answer shall be a formal denial of the allegations, and need not be sworn to. If the party chooses to swear to it, it makes no alteration as to its legal effect. Its admissions do not dispense with proof as to the material allegations, so neither should its denials require greater proof.

Where the 4th section of the act of 1820 (Clay's Dig. 170, § 6,) says "that proof shall be required to support the allegations thereof, as in cases where they are decided by answer," it means the answer previously spoken of in the same section—a formal answer denying the allegations, and not sworn to. It is very clear that the Legislature did not design to put these cases upon a footing with ordinary chancery proceedings; but by making the recovery of the complainant depend on the proof, to render it wholly independent of the admissions of the answer.

Upon the whole case, we think the complainant should be entitled to the relief prayed. The decree of the Chancellor dismissing the bill must be reversed, and the cause remanded for further proceedings consistent with this opinion.

HERNDON *vs.* GIVENS' ADM'R.

1. When a declaration contains a special count and also the common counts, and the evidence, though inapplicable to the common counts, clearly entitles the plaintiff to a recovery on the special count, the appellate court will not reverse on account of the court below instructing the jury that he was entitled to recover on the common counts.
2. A distributee of an estate may become a competent witness for the administrator by releasing to him his distributive share in the estate.
3. But he is not a competent witness to prove the execution of his own release.

ERROR to the Circuit Court of Talladega. Tried before the Hon. E. Pickens.

RICE & MORGAN, for plaintiff in error:

1. The interest of James A. H. Givens having been first shown *cliunde*, it was erroneous to allow him to prove that he had released.—Dent v. Portwood, 17 Ala. 242.

2. But a release by an heir to an administrator, of all claim, right, title, or interest in the estate of the intestate, does not render the heir a competent witness for the administrator, if the intestate died seized of real estate; such release does not divest the heir of his interest in the land, nor does it exempt him from contribution for costs, if the administrator lost the suit.—Scales v. Desha, 16 Ala. 308, and cases therein cited; Blackman v. Blackman, 16 Ala. 633.

3. But here the heir (James A. H. Givens) had actually received an advance of $350 from the intestate, and the release

could not exempt that advance from liability to then existing creditors, provided the costs of this suit should exhaust the estate and make it necessary for creditors to resort to the advance thus made.

4. The heir here was also the original owner of the chose in action sued on, and transferred it to the intestate as collateral security for a debt due the intestate.—Houston v. Prewitt, 8 Ala. 486.

5. The first charge given is erroneous, especially when scanned and interpreted in connection with the evidence. This charge overlooks the fact that it is an irregular endorsement—an endorsement by Herndon, alone, of a note payable to Herndon & Kelly. This charge relieves the intestate of suing the makers of the note in the county of their residence. It assumes that the endorser would be liable upon a promise, although it was made in utter ignorance of the failure of the endorsee to sue according to law, in the proper county, and with proper diligence. It assumes that without any special replication of a subsequent promise, an endorsee may recover of an endorser, who has become a certificated bankrupt, upon proof of a subsequent promise, and that such recovery can be had under the count for an account stated, without any special replication to the plea of bankruptcy.

White & Parsons, *contra:*

1. If Jas. A. H. Givens was interested, it was only as distributee, (see Herndon v. Givens, 16 Ala. 268,) and a release by a distributee to the administrator of all interest in the estate renders him a competent witness for the administrator.—Scales v. Desha, Shepherd & Co., 16 Ala. 311; 1 Green. Ev. § 428; 4 Camp. 27; 9 Ala. 219. The right of action was never in the witness, and he cannot, therefore, be a transferror of a chose in action, and the rule of public policy does not exclude him.—See, as illustrating the distinction, Bell v. Smith, 5 Barn. & Cress. 188; Houston v. Prewitt, 8 Ala. 846. A nominal consideration is sufficient to sustain the release.—16 Ala. 311.

Plaintiffs are entitled to recover under the *insimul computassent* count.—1 Chitty Pl. 358; 10 East 104; 11 ib. 118; 13 ib. 243; 16 ib. 240; 17 John. 38; 2 Call. 299.

This is not an effort to revive an old debt, the remedy upon

which is barred, but to enforce a promise, resting for its support upon the moral obligation of the bankrupt to pay a debt which, in law, had been discharged.—Brin v. Braham, 1 Bing. 281; Chitty on Con. 267; Bank v. Boykin, 9 Ala. 320.

If a new promise be conditional, it is a new assumpsit, for which the old debt is a sufficient consideration.—Witzell v. Buzzard, 11 Wheaton, 309.

Discharge in bankruptcy may be given in evidence under the general issue in assumpsit.—1 Chit. Pl. ; 12 Wend. 470.

When parties go to trial without a replication to a special plea, and the matter of replication is available under the general issue, the informality is presumed to have been waived by mutual consent, and the trial to have gone on the merits.—Bond v. Hills & Fay, 3 Stew. 183. Wheelock v. Fitch, 3 Por., is overruled in Abercrombie v. Moseley, 9 Por. 148.

There is in this case certainly no attempt at a replication of a new promise, and if the word replication in the record is held to apply to this plea of bankruptcy, it can be intended to mean nothing more than a simple replication and issue upon the facts set forth in the plea.

DARGAN, C. J.—The declaration in this case contains several special counts, and also the common or usual money counts. The last special count sets forth with particularity the material facts which were proved upon the trial, to wit: the making of the note by the Tidmores, payable to Herndon & Kelly, the endorsement thereof by Herndon to James A. Givens; the bringing of the suit in the name of Herndon & Kelly, for the use of Givens; the rendition of judgment thereon, and the subsequent levy of an execution on the land of John Tidmore, one of the defendants. This count also alleges that John Tidmore filed his bill in equity against Herndon & Kelly, and also against said Givens, praying an injunction, upon which a final decree was rendered, perpetually enjoining, as to him, the said execution. From this decree, an appeal was taken to the Supreme Court, and pending the cause in the Supreme Court, and after the discharge of said Herndon as a bankrupt, he, the said Herndon, promised that he would pay said note, so endorsed by him, if the decree of the Chancery Court should be affirmed. It is

then averred that the decree was affirmed by the Supreme Court, whereby the defendant became liable to pay, &c. The defendant filed several pleas to the entire declaration, among which is the plea of his discharge in bankruptcy, *since making* the promises in the declaration mentioned. Upon this plea issue was joined, and the evidence which was introduced clearly shows that the endorsement of the note was made before the defendant was declared a bankrupt, but his promise to pay, if the decree of the Court of Chancery should be affirmed by the Supreme Court, was made after his discharge as a bankrupt was duly obtained. The court charged the jury upon this evidence, that the plaintiff was entitled to recover upon the count for an account stated, to which the defendant excepted.

It is a well settled rule of law, that an express promise to pay a debt, which the promissor is under a moral obligation to pay, will be enforced, although the legal remedy to enforce the payment of the original debt is extinguished by the statute of limitations or of bankruptcy.—Chit. on Con. (7 Amer. ed.) 190; Scanton v. Elslond, 7 John. 37; Shippen v. Henderson, 14 John. 178. But if the promise to pay be conditional, it is then incumbent on the plaintiff to prove that the condition has happened or been performed, and in such a case it is said to be the best mode of pleading, to set out specially the conditional promise, and then aver the fact or facts that make the promise absolute.—Chit. on Con. 191; Penn v. Bennett, 4 Campbell, 205; Fleming v. Hayne, 1 Starkie 370. Indeed, the authorities we have referred to would seem to imply, that when the promise is conditional it cannot be treated in the pleadings as an absolute and unconditional one, but that it should be alleged as made, and then the condition upon which the party promised to pay must be proved to have happened or to have been performed. The last special count in this declaration correctly avers all the circumstances attending the promise material to have been alleged, and then shows that the condition had happened upon which the promise was to be absolute. The evidence, too, clearly shows that this promise was made after the defendant was discharged as a bankrupt. The plaintiffs, therefore, were clearly entitled to recover upon this count, for the material part of the issue joined on the plea of bankruptcy was, whether the conditional promise was made before or after the discharge in bank-

ruptcy. And inasmuch as the plaintiff was clearly entitled to recover according to the evidence upon this count, we think it clear that the judgment could not be reversed, even if we admit that the evidence was inapplicable to the count for an account stated; for the defendant, in no sense, could be injured by the court's directing the jury that the plaintiffs could recover upon the common count, when the evidence clearly entitled the plaintiffs to a recovery on this special count. Whether the recovery was on the one or the other, the amount would necessarily be the same, and the defendant has suffered no injury by these instructions.

2. The plaintiffs introduced James A. H. Givens as a witness, and it was admitted that he was a son of the intestate, and one of his distributees; thereupon the plaintiffs introduced a release from said witness to them, whereby he released all his interest as a distributee in his father's estate, to the plaintiffs, and proposed to prove the execution of the release by the witness himself. To this the defendant objected, but his objection was overruled. It is settled by the decisions of this court, that a distributee of an estate may be rendered a competent witness for the administrator, by a release to him of all the interest of the witness in the estate of which he is a distributee.—Scales v. Desha, Shepherd & Co., 16 Ala. 308; Hall v. Alexander, 9 Ala. 219. Whether there may not be cases in which a simple release by a distributee, as such, would be insufficient to render him competent, it is not necessary to inquire; for it was shown that the estate of the decedent was entirely solvent, nor did it appear that his lands would be required to be sold to pay the debts, whether this suit failed or not; and before the question could be raised, that the interest of the witness in the lands descended to him from his ancestor rendered him incompetent, notwithstanding his simple release as a distributee, it should be shown, that the lands would be required for the purpose of paying the debts unless the administrator was successful in the suit, to sustain which, or the defence thereto, the distributee is called. This question we shall not decide, for it is not necessary; for, inasmuch as no question was made that the lands descended would be required to pay the debts if this suit failed, a release by the distributee of his distributive share clearly rendered him a competent witness for the administrator. This, however, does not get over the difficulty in this case, for the

question still remains whether the distributee was a competent witness to prove the release. Had the release been proved *aliunde*, then the fact being established that he was no longer interested, he could have properly testified in the cause; but the question is, was he competent to prove his own release, and thus qualify himself to give testimony in favor of the administrator? In the case of Dent v. Portwood, (17 Ala. 242,) we had occasion to examine this precise point, and the conclusions to which we came were, that where the interest of the witness was made to appear from his own examination, he might be further examined for the purpose of showing that it had been extinguished or released. But on the other hand, if the interest of the witness appeared *aliunde*, and not from the examination of the witness himself, then the witness could not be examined to remove the objection, or to prove the execution of the release. I have looked into the authorities, and the reasons upon which that case rests, and I am satisfied it is correct; for, if the witness is shown to be interested otherwise than by his own testimony, his mouth is closed, and he cannot be permitted to testify at all until the objection is removed, and consequently cannot speak to remove the objection. But if the objection of interest is raised by the testimony of the witness himself, in the course of his examination, it is then but reasonable to permit the objection to be removed by the same means by which it was created. Applying these tests to the question whether the witness, James A. H. Givens, was competent to prove the release executed by him, as a distributee, to the plaintiff, we are constrained to hold that he was not. When he was offered by the plaintiffs it was admitted that he was a son and one of the distributees of the intestate. This rendered him incompetent, and the objection to his interest was then made. After the objection was made, the court permitted the witness, at the instance of the plaintiff, to prove the execution of his release. In this there was error.

We need not examine whether the court erred in permitting Edward Givens to prove the release executed by him, for it is manifest that upon another trial this can be done by other testimony. Nor shall we examine in detail the other questions raised in the course of the argument; it is sufficient to say that if any of them would avail the plaintiff in error, they can be removed in a subsequent trial.

The court erred in permitting James H. Givens to prove the release by him executed, and the judgment must be reversed and the cause remanded.

CHILTON, J., having been of counsel, did not sit in this case.

METCALF *vs.* METCALF.

1. A record can only be amended by some matter of record.
2. A memorandum in the hand writing of the Judge of Probate on the trial docket of his court, in the following words, viz: "J. M. heir of A. M. v. Administrators; Ordered to appoint Auditors, (naming them;) Ordered that they report *instanter;* Auditors report in administrator's hands, $469 82,"—is insufficient to authorize the court to render a decree *nunc pro tunc* at a subsequent term, against the administrators in favor of J. M. for the amount thus ascertained.

ERROR to the Court of Probate of Dale county.

On the 14th August, 1849, a decree *nunc pro tunc* was rendered as of the March term, 1848, by the Court of Probate of Dale county, in favor of Isaac Metcalf against John and Mary Metcalf, administrators of Anthony Metcalf, for the amount of his distributive share of the estate of said decedent. The memoranda upon which the decree *nunc pro tunc* was rendered, are set out in the record, and are as follows:

"Joshua Morris, heir of A. Metcalf, use of J. W. Williamson v. Adm'rs. Judgment on demurrer. Leave to amend granted on payment of costs of the term. Costs paid by S. T. Roach, attorney. Ordered to appoint auditors, Benjamin Walding, Mathew Johnson, and Daniel Johnson. Ordered that they report *instanter*. Auditors report in administrator's hands, $469 82. Isaac Metcalf, heir of A. Metcalf v. Administrators. Same as above as to auditors, &c. Auditors report in hands of administrator, $469 82." The clerk certifies that the foregoing "extract from the trial docket of the Orphans' Court," is the only re-

cord, note or memorandum in his office, upon which the proceedings of August 14, 1849, could have been predicated.

Buford, for plaintiff in error, cited Brown v. Bartlett, 2 Ala. 30; Armstrong v. Robinson, ib. 164; Waldo v. Spence, 4 Conn. 71; Atkins v. Sawyer, 1 Pick. 351; People v. McDonald, 1 Cowen, 189; Thompson v. Miller, 2 Stew. 470; Bently v. Wright, 3 Ala. 607; Binford v. Daniels, 13 Ala. 667; Draughan v. Tombeckbee Bank, 1 Stew. 66; Rains v. Ware, 10 Ala. 623; Bondurant v. Thompson, 15 ib. 202.

F. S. Jackson, *contra*, contended that the order to enter judgment *nunc pro tunc* was not a judgment on which execution could issue; and that if an execution was issued upon it a *supersedeas* would be the proper remedy.

PARSONS, J.—There are numerous decisions of this court covering the points presented by the assignment of errors in this case.—Miller v. Thompson, 2 Stew. 470; Wilkinson v. Goldthwaite, 1 Stew. & Port. 159; Moody v. Keener, 9 Port. 252; Brown v. Bartlett, 2 Ala. 30; ib. 164; Benford v. Daniels, 13 Ala. 667; Bondurant v. Thompson, 15 Ala. 202. It is well settled by these decisions, that a record can only be amended by some matter of record; and that parol evidence is not admissible for this purpose. In Brown v. Bartlett, *supra*, it is held that if no warrant for the amendment appears in the record, none can be presumed to exist; and to the same effect is the case of Rains v. Ware, 10 Ala. 625. Upon what evidence, except the memoranda on the trial docket set out in the record, the judgment *nunc pro tunc*, entered on the 14th August, 1849, was predicated, is not shown, and we have seen that we cannot presume that any other evidence exists, or was before the court; the memoranda are wholly insufficient.

In Moody v. Keener, 9 Port. 252, issue had been joined on the plea of "not guilty," in an action on the case. The jury returned a verdict in favor of the plaintiff, which the judgment entry recited as a verdict in an action of assumpsit. The judgment was reversed by this court, because the verdict was not responsive to the issue. Upon the cause being remanded to the Circuit Court, a motion was submitted to amend the judgment entry *nunc pro tunc*, which was sustained. The evidence in-

troduced to sustain the motion was the docket of the judge presiding on the trial of the cause, which contained the following memoranda opposite the statement of the case, viz: "Dem. overruled. Jury, 1, verdict for plaintiff," and the file of papers in the cause; and upon the writ was an indorsement in these words, viz: "We the jury find for the plaintiff $1,000 25 with interest and costs of suit." This proof was held to be insufficient to authorize the judgment *nunc pro tunc*.

In this case, the memoranda show but few of the facts, upon which a regular decree of the Orphans' Court could be based. They do not show a presentation of his accounts and vouchers by the administrator for settlement, publication as required by law, an allowance of the accounts and vouchers by the court, the amount received by the administrator, or the amount paid out by him; nor do they show who is the administrator, nor whether the settlement was partial or final. If it be legitimate to look to these memoranda, they are wholly insufficient.

The judgment must be reversed, and the cause remanded.

LONG *vs.* RODGERS.

1. The appellate court will not notice any errors except such as are assigned upon the record; and the practice is to examine such of them only as are insisted on by counsel.
2. A memorandum made by a justice of the peace at the time of the trial of a prosecution before him, showing the judgment which he rendered in the cause, is admissible evidence in a subsequent action instituted by the defendant against the prosecutor, to show the termination of the prosecution.
3. R. and L. were arrested under a warrant issued by a justice of the peace, charging them with having unlawfully taken the prosecutor's daughter from his premises, and detaining her against her will and consent, with intent to carry her out of the State. After the termination of the prosecution, R. brought an action against the prosecutor for a malicious prosecution. To rebut the presumption of malice, the defendant proved his own declarations, made after the abduction of his daughter, but before the issuance of the warrant,

expressing his willingness that L. might marry his daughter. *It was held*,

1st. That the plaintiff might prove that these declarations were communicated to L., although the defendant was not present when the communication was made.

2nd. That the plaintiff might also prove, that L. did not detain the young lady against her will and consent.

3rd. That the plaintiff might also prove, that at the time of the institution of the prosecution, the defendant entertained unfriendly feelings towards the family of which the plaintiff was a member.

4. When the evidence which is objected to by the plaintiff in error is not set out in the bill of exceptions, the appellate court will presume in favor of the correctness of the judgment that the evidence was admissible.

5. The construction of a written affidavit is a question for the determination of the court, and not of the jury.

6. When any portion of a charge requested is illegal, the court may refuse the charge *in toto*.

7. To sustain an action for a malicious prosecution, there must be malice as well as a want of probable cause.

8. There may be facts and circumstances which do not amount to probable cause, but which, being evidence of a want of malice, may justify the acquittal of the defendant upon the ground that there was an entire absence of malice.

9. So on the other hand, an entire absence of actual malice may consist with the absence of every reasonable ground for a belief of the party's guilt; still, in such case the law implies malice, because there is no proof to extenuate the prosecutor's act which has been rashly and indiscreetly done.

10. Although the defendant honestly believed that the plaintiff was guilty of the offence charged, and acted upon such honest conviction, yet if there was a want of probable cause, such belief would not excuse him, unless it was founded on facts and circumstances which would create such a belief in the minds of honest and reasonable men.

11. If no probable cause in fact existed, and the defendant failed to use such precaution as a prudent man would use to ascertain that fact, although he acted entirely without malice, yet in such case malice will be inferred from the want of probable cause.

12. Although the charge given by the court is not in the language in which it is requested, yet if it be a full and fair exposition of the law, and not calculated to mislead the jury, the judgment will not be reversed.

(CHILTON, J. Dissenting, held, that if the charge requested asserts a cor-

rect legal proposition in appropriate terms, and is applicable to the proof, it should be given in the language of the request.)

ERROR to the Circuit Court of Butler. Tried before the Hon. Nathan Cook.

Wesley Rodgers and William Leaird were arrested under a warrant issued by a justice of the peace, at the instance of William Long, charging them with having unlawfully taken from his premises his daughter, and detaining her with intent to carry her out of the limits of the State against her will and consent. After the termination of the prosecution, Rodgers brought this action against Long, to recover damages for the malicious prosecution. To show the termination of the prosecution, the plaintiff offered in evidence a memorandum written at the time of the trial by the justice before whom the trial was had, its execution having been proved by the justice, who also testified that he kept no regular docket. The defendant objected to the admissibility of the paper, but his objection was overruled, and he excepted. The several exceptions, and the charges given and refused, are set out in the opinion of Chilton, J. This case may also be found in 17 Ala. 540.

ELMORE & YANCEY, for plaintiff in error:

1. In an action for a malicious prosecution the plaintiff must show the prosecution to be ended.—1 Chit. Plead. 679; 2 Greenl. Ev. § 452.

2. The memoranda, or paper introduced to prove that fact, should have been rejected as not being a record, nor an office paper, and could only have been used to refresh the memory of the witness.—Vastbinder v. Metcalf, 3 Ala. 100; 1 Stark. on Ev. 154.

3. The conversation between Long and Thagard, relative to the message of Leaird that he would marry Sarah Ann, was introduced by plaintiff in error but for one purpose, viz: as tending to disprove malice in Long in instituting the prosecution.

4. The communication of what Long then said to the Leairds was irrelevant, as neither tending to prove malice in Long in prosecuting Rogers, nor want of probable cause.

5. The reply of the Leairds, when this conversation was communicated to them by Thagard, was also illegal, as being

but the declarations of persons competent as witnesses, not a part of the *res gestæ*, and irrelevant.—1 Phil. on Ev. p. 169-171.

6. The fact that the language used by the Leairds does not appear in the record, is not fatal to the exception. Nothing that they could have said could elucidate the issue—Long's feeling to the Leairds. If there has been error, the court will presume injury, unless the record shows that no injury accrued to the party thereby.

7. The fact that Leaird did not detain Sarah Ann against her will was irrelevant to the issue, as no such charge had been preferred against Rogers; and even if there had been, this did not tend to prove that Rogers did not detain her against her will.

8. The facts as stated in the first charge asked for by the plaintiff in error, show that Long had preferred no offence against Rogers, for which he could have been examined before a magistrate. This charge did not leave the construction of the affidavit to the jury—the court had already given to the jury the legal effect of the affidavit—and the charge was based upon an admission that such was its legal effect, but that the facts of the case might vary that construction.

9. Two things are indispensable in this action: first, a want of probable cause; second, malice.—Chandler v. McPherson, et al., 11 Ala. 919; 2 Greenl. on Ev. §§ 449-453; Stone v. Crocker, 24 Pick. 81-83. Malice may be inferred from want of probable cause, but this implication may be repelled by proof. —Wood v. Weir, 5 B. Monroe, 546-550. Want of probable cause is but one of the evidences of malice, which can be rebutted by other proof.—Stone v. Crocker, 24 Pick. 81; 24 ib. 11.

10. If the jury believed from the evidence that Long, in prosecuting Rogers, acted under an honest belief of his guilt, then one essential ingredient of this action, malice, is wanting, and the second and last charges asked for (numbered 3 and 7) should have been given, without qualification.—Chandler v. McPherson, et al., 11 Ala. 919. If the evidence showed an entire absence of malice in the prosecution, then the plaintiff could not recover; and the charge asked for (numbered 5 on the record) should have been given; and the charge as given (numbered 6 on the record) was error. It is the duty of the court, when a

proper charge is requested, to give it; and the refusal cannot be justified by afterwards giving one less extensive but free from error.—Maynard & Co. v. Johnson, 4 Ala. 116; Ivers v. Phifer, 11 ib. 535; Cleaveland v. Walker, 11 ib. 1058; Cole v. Spann, 13 ib. 537.

11. Malice is a pure question of fact, for the jury to decide. —2 Greenl. on Ev. § 453. If, however, malice "*must* be inferred" from want of probable cause, it becomes a question of law, which the judge may withdraw from the jury. This view proves that malice is only *inferrable*.—See case cited in note to § 453, of Greenl. on Ev. 2 vol. A charge asked for cannot be abstract, if there is any evidence to warrant the proposition.—Bradford v. Marberry, 12 Ala. 520; Hinton v. Nelms, 13 ib. 222.

12. That in refusing to give the charge asked for by the plaintiff in error, in the terms in which it was asked, the court below erred, though it afterwards gave a charge containing substantially the same principle.—Rives et al. v. McLosky, 5 S. & P., 330; Maynard v. Johnson, 4 Ala. 116; Ivers v. Phifer, 11 ib. 535; Cleavland v. Walker, 11 ib. 1059: Hinton v. Nelms, 13 ib. 222; Cole v. Spann, 13 ib. 537; Phillips v. Beene, 16 ib. 720, Livingston & Gilchrist, v. Maryland Ins. Co., 7 Cranch 505; see p. 544; Noble v. McClintock, 6 W. & Sergt. 58; State of Illinois v. Wilson, 2 Scam., 225; Hill v. Ward, 2 Gillman 285.

It is not a mere question of practice. It involves a principle.—Declaration of rights; Constitution of Ala. Art. 1, § 29. As long as a party uses respectful and appropriate language, and invokes an acknowledged legal principle in his defence, no judge has the right to substitute for him or against him that principle clothed in different phraseology.

As a question of practice, the universal opinion of the bar calls for an adherence to this long and well settled practice, as a protection against the partiality of a presiding judge, and against the misconception of juries.

An adherence to past decisions is a principle which guides every appellate tribunal, unless clearly they are erroneous in principle, and calculated to do injury.

In this case, no injury can accrue by an adherence to the rule.

1. Because the presiding judge has it in his power at all times to explain and qualify any correct legal principle which may be asked, so as to make it conducive to a proper understanding of the case.

2. When, however, a refusal of a correct legal charge is given, and the same principle given in different terms, there is no power in the attorney to correct any misapprehension produced on the jury by the refusal to give the law as asked for his client.

3. The "refusal" to acknowledge the correctness of the legal principle asked for, is the gravamen of the error, and not the mere giving of the same principle in different words. If a court should respond affirmatively to such a charge, and yet give it in its own terms, even this would prevent misconception in the jury. In this case, the court "refused," and therefore did not respond affirmatively.

WATTS, *contra:*

1. Although this is a long bill of exceptions, the facts are not stated in such a way as to show that any error has been committed to the injury of the plaintiff in error. Affirmative error must be shown; this court will not presume it.

2. The first two exceptions are not assigned as error, and of course will not be revised by the court.

3. The admission of the memorandum was proper to show the termination of the prosecution.—See Spear v. Cross, 7 Por. 439; Tayler v. Briggs, 4 Met. 421; Rathman v. Slyer, 7 Watts. 189; Williams v. Woodhous, 3 Dev. 257; Bostick v. Rutherford, 4 Hawks. 83; Bullock v. Ogburn, use, &c. 13 Ala. 346; Kennedy v. Dear, 6 Por. 90.

4. The admission of what Thagard communicated to the Leaird's, (they being charged jointly with the plaintiff below) was the same thing as if communicated to Rogers himself.—See Greenl. Ev. vol. 2, § 453. It was in rebuttal to, or explanation of testimony introduced by defendant below, and for this reason would be admissible, &c. The defendant below proved what he had said to Thagard, and he proved that he requested Thagard to communicate it to the Leaird's. It was then but a conversation between Long and the Leaird's, carried on through the medium of Thagard. But the bill of exceptions does not show what this conversation and acts were, and this court can-

not see therefore, how the plaintiff in error was injured thereby. It was his duty to show this.

5. The proof that the Leairds did not detain defendant's daughter against her will, tended to show, and did show, that there was want of probable cause for the arrest, and was therefore proper. The Leaird's and Rogers were jointly charged in the warrant.—See Long and Rogers at the last term of this court.

6. The proof that there were unfriendly feelings between the family of Rodgers and Long was admissible as a circumstance to show Long's malice.

7. As to the charges; the first charge excepted to is not assigned as error, and cannot be looked to.

8. The first charge asked, (as shown by the bill of exceptions) should not have been given, and was properly refused. The first part of it was objectionable, because it asked the court to leave the construction of the affidavit to the jury.—See Long & Rogers, decided at the last term. If the balance of the charge was correct, for this reason the court might well have refused it; the court was not bound to distinguish between the legal and the illegal. But the latter part of it was illegal also. The advice of a justice of the peace could not protect him.—Williams v. Vanmeter, 8 Miss. 339. The justice was not shown to be learned in the law, and it is not shown that Long communicated to him truly and fully all the facts, and asked his advice thereon, even if it had been proven that he was learned in the law.—See Little v. Blunt, 3 Mason, 102; Williams v. Vanmeter, 8 Miss. 339, *supra*. This court will scarcely presume, in the absence of proof, that a justice of the peace is learned in the law.—See further, Hewlett v. Cruchly, 5 Taunt. 277.

9. As to the next charge. Malice may well be inferred and must be inferred, from an entire want of probable cause.—See 1 Greenl. on Ev. § 18; 2 ib. § 453, the latter part of the section particularly, and authorities cited in the note; see also King v. Root, 7 Conn. 613; Murry v. Long, 1 Wend. 140; Kirksey v. Jones, 7 Ala. 622; Whitehurst v. Ward, 12 Ala. 264; Stark. on Ev. 912; Wills v. Noyes, 12 Pick. 324. Unless the qualification of the charge given be the law of this State, then there is no safety to the community against reckless or pretended ignorance and secret malice.—See Hall v. Hawkins, 5 Humph. 357; Faris v. Starke, 3 B. Monroe, 4; Hickman v.

Griffin, 6 Mis. 37; Merriam v. Mitchell, 1 Shep. 439; (13 Me.;) Wood v. Weir, 5 B. Monroe; Travis v. Smith, 1 Penn. 234; Holburn v. Neal, 4 Dana 121; 19 Wend. 417; Wiggin v. Coffin, 3 Story 1; Fushay v. Ferguson, 2 Den. 617; Rice & Ponder, 7 Iredell 390.

10. The next charge asked and that given are the same in substance as that noticed under the ninth point, and the other charges assigned as error are the same in substance. But these charges asked are abstract; there was no testimony showing that the defendant acted on an honest belief of the charge made against Rodgers. It was clearly shown that as to Rogders, there was not the shadow of probable cause, and it was shown that independent of the entire want of probable cause, there was malice.—See Holmes v. Gayle & Bower, 1 Ala. 517; Stone v. Stone, 1 Ala. 582. The charges asked were objectionable in another point, viz:

11. They asked the court to leave to the jury the question as to whether there was probable cause. This is a mixed question of law and fact; the charge should have asked the court to say whether certain facts did or did not amount to probable cause. The jury must find the facts, and the court determine whether or not there was probable cause.—See Wilder v. Holden, 24 Pick. 11; Stone v. Croker, 24 Pick. 81; Wills v. Noyes, 12 Pick. 324; Carrico v. Meldrum, 1 A. K. Marshall 224; Ives v. Bartholomew, 9 Conn. 309; Stone v. Stevens, 12 ib. 219.

12. In a legal sense any unlawful act done wilfully to the injury of another, is malicious.—See Commonwealth v. Snelling, 15 Pick. 337.

CHILTON, J.—It is well settled, that this court will not notice any errors except such as are assigned upon the record, and the practice is to examine such of them only as are insisted on by the counsel.—Cunningham v. Carpenter & Watson, 10 Ala. 109. The admission of the affidavit and warrant as evidence cannot, under the rule above laid down, be considered by us, the same not being embraced by the assignment of error.—See Stebbins v. Fitch, 1 Stew. 180; Minor's Ala. 11, 23, 35.

2. The cases of Kennedy v. Dear, (6 Por. 90) and Bullock v. Ogburn, use, &c. (13 Ala. 346,) show that there was no error

in admitting as evidence to the jury the memorandum made at the time of the trial by the justice of the peace trying the cause, of the judgment which he rendered, the same containing the written evidence of his judgment, as explained by the justice who produced the paper and who presided at the trial.

3. We think there was no error in permitting the plaintiff to prove that what the defendant Long told Thagard as to his willingness for Leaird to marry his daughter, and that he would give him, in the language of the bill of exceptions, "if Leaird would come to him, a permit to marry her," was communicated to Leaird. Long had proved that Thagard had this conversation with him one or two days before suing out the warrant. Now the fact of Long's willingness to the marriage, if communicated to Leaird, conduced to show that the latter was not guilty of a breach of the peace in going off with the girl, but that his object was to marry, not to imprison her, or deprive her otherwise of her liberty; that Long was not present when this communication was made to Leaird makes no difference. If what he said, upon being communicated, tended to justify or to explain the conduct of Leaird in going off with the young lady, to this extent it tended to show that Long was apprised of the real intention of the parties in doing what they did, and that their conduct may have been and probably was influenced by his representations. At all events, it tended to explain the transaction, and to show the want of probable cause, and this, independent of any knowledge on the part of Long whether or not what he told Thagard had been communicated to Leaird, and in this view it was admissible. The plaintiff must prove that the prosecution was instituted maliciously and without probable cause. Malice may be inferred by the jury from the want of probable cause; it may also be proved by the defendant's conduct, and declarations conducing to show that the charge he preferred, or the prosecution he incited, was unfounded.—2 Green. on Ev. § 453, and cases cited. These declarations, and the proof of their being communicated, were not, therefore, irrelevant, but properly admitted.

4. It is further objected, that the plaintiff was allowed to prove what William and Henry Leaird said in response to the communication of Thagard, and what passed between Thagard and Leaird at the time. The bill of exceptions does not state what

was said or what took place between them on the occasion referred to; so that it is obvious we cannot reverse for this supposed error, since we cannot, in the absence of the proof, determine upon its admissibility, or whether its admission injuriously affected the party excepting. Presuming against the bill of exceptions, we must intend in favor of the correctness of the judgment below, that such proof did not injuriously affect the defendant, or was part of the *res gestæ*, otherwise he would have set it out in the record for our inspection and reversion.—Holmes v. Gayle & Bower, 1 Ala. 517; Stone v. Stone, use, &c., ib. 582; Pearson v. Howe, 11 ib. 370. The bill of exceptions then fails to show error in the matter of the admission of this proof.

5. It is insisted that the court erred in allowing the plaintiff below to prove that Leaird did not detain defendant's daughter against her will; that such proof was irrelevant, under the issue, and did not tend to show that Rogers, the plaintiff, did not so detain her. We do not concur with the counsel in this view. The affidavit made by the defendant Long, and the warrant thereupon issued, preferred a joint charge against the Leairds and Rogers, of unlawfully taking the daughter of the prosecutor from his premises, and the affidavit stated that "Henry Leaird intends to carry her out of the limits of this State, against her will and consent." The just and fair construction of the affidavit is, that the parties therein named united in unlawfully taking the young lady from the premises of her father, that Henry Leaird might carry out his intention of taking her out of the State against her consent. It was then competent for the plaintiff to show, that she remained away from her father willingly, and that no one detained her against her consent. But the evidence is proper in another view. It is unnatural, and opposed to experience, that the daughter, having been unlawfully taken from her parents' residence against her consent, being at a marriageable age, should choose voluntarily to stay with those who had mistreated her. It is, therefore, a circumstance which the jury may take into consideration, in determining whether she did not willingly go, as the proof conduced to show that she voluntarily remained away.

6. The next error assigned is, that the plaintiff below was allowed to prove that when this prosecution was instituted the de-

fendant entertained unfriendly feelings towards the family of which the plaintiff was a member. We think such proof was admissible. In suits for prosecutions of this kind, malice is the gist of the action, and whatever tends to show that the prosecutor was actuated by malicious feelings, or a desire to gratify his revenge or spite, is competent. It may be very weak testimony in the proportion, as it may be rebutted by other proof in the cause showing that the prosecutor was influenced by no improper motive, and that he acted under an honest conviction that the cause for the prosecution really existed; nevertheless the proof may properly go to the jury for what it is worth.

7. We come lastly to the consideration of the charges of the court, to which exceptions were saved, and to the refusal of the court to charge as prayed by the defendant below.

We pass by the first charge given by the court, the same not being assigned for error. As to the charge first asked by the defendant below, it is only necessary to say that it devolved upon the jury the construction of the affidavit in connection with the other evidence. When this cause was before us at a previous term, we held it to be the duty of the court to construe the affidavit when called upon.—See 17 Ala. 540. The court then properly refused to refer its construction to the jury for them to determine, either solely or in connection with the other proof, whether it involved the charge of a felony or a misdemeanor, or no charge cognizable by the criminal law. The written affidavit made by the defendant, Long, speaks for itself. Its legal effect as embodying a charge against the plaintiff below of a violation of the criminal law, is a question which the court, and not the jury, should determine. This portion of the charge being improper, the court very correctly refused the whole, since the court is not required to give a charge, any portion of which is illegal, but should refuse the whole, unless the judge chooses to separate the legal from the objectionable portion of it, which he may, but is not bound to do.—Rives & Mather v. McLosky & Hagan, 5 S. & P. 330; Carmichael v. Brooks, 9 Por. 330, and cases cited on page 334.

8. The defendant asked the court for several specific charges, which the court refused to give without superadding a qualification to each, but which, (with the exception of one,) we think, upon a fair construction of the bill of exceptions, were given

with the qualification, of which we will hereafter speak more particularly.

The only charge which was not given in the terms asked, but with a qualification, is as follows: That "if the jury should believe there was an entire want of probable cause, yet if they believe from the proof that the defendant acted entirely without malice, then he was not liable in this action." This charge the court refused in the terms asked, but charged the jury "that if there was no probable cause, and the defendant did not use the precaution which a prudent man would use to ascertain that fact, that then malice would be inferred from such failure on his part."

It is well settled, that to sustain this action, there must be malice, as well as a want of probable cause. But when the law speaks of malice in this connection, it does not imply that there should be actual ill will, hatred, or a desire to injure the party prosecuted through revenge or spite. If the prosecutor, in the entire absence of any probable or reasonable grounds justifying even a suspicion of the party's guilt, sets the prosecution on foot, the legal implication of malice necessarily arises, but at the same time there may be, on the other hand, circumstances of suspicion, which, in judgment of law, would not amount to probable cause, and which nevertheless would fully justify the conclusion on the part of the jury trying the cause, that there was an entire absence of malice. Otherwise, it would be sufficient in all cases to prove a want of probable cause to entitle the party to recover, and the legal presumption of malice which arises out of the want of such probable cause would thus be made conclusive. Lest we should be misunderstood, we repeat, there may be facts and circumstances which do not amount to probable cause, but which, being evidence of a want of malice, may justify the acquittal of the defendant upon the ground that there was an entire absence of malice. So, on the other hand, an entire absence of actual malice may consist with the absence of every reasonable ground for the belief of the party's guilt; still in such case, the law implies malice, because there is no proof to extenuate the party's act, which has been rashly and indiscreetly done.—3 Starkie's R. 389.

Now, in the case before us, as in all cases, we should refer the charge asked as well as the charge given, to the facts. Thus

considered, I think the charge refused was proper, and should have been given. There was some evidence furnished by the circumstances, conducing to show that the prosecutor was actuated by a *bona fide* desire to bring those whom he honestly believed to have been guilty of a violation of the criminal law, to the bar of justice. As applicable to this state of the proof, the defendant below asked the court to charge that although there might be an entire absence of probable cause, yet, if there was an entire absence of malice, the party must be acquitted. The charge was general, but nevertheless, when taken in connection with the proof, was correct in point of law, and I think should have been given as it was requested. If the court deemed it too general, and desired to restrict its effect, and to limit it, another explanatory charge might well have been given, but this, in my judgment, should not have been refused. My brethren are of opinion, that although the charge given in lieu of this operated to restrict it, yet if it was a restriction which, when taken in connection with the evidence in the cause, presented the law of the case in a correct and clear light before the jury, and in a manner calculated to prevent any misconception of the law on their part, which might result from the general nature of the charge refused, they will not reverse for such refusal. They think the charge given embraced the substance of so much of the charge demanded, as placed the law of the case more properly before the jury. They concede the correctness, however, of the charge which the court refused to give in the terms asked, and justify its exclusion from the jury, for reasons which they will assign.

For myself, I cannot consent to depart from a practice which has long been acquiesced in, and which is as firmly settled by the repeated decisions of this court, as a question of practice can well be settled. Awarding to the juries of the country all the acumen which may be claimed for them, and to the judges of the primary courts all the legal learning necessary to qualify them for the proper discharge of the high responsibilities devolved upon them in the administration of the law, still it is not assuming too much to say, that juries may labor under very erroneous impressions in regard to the law, conceived from the *refusal* of the court to give a charge which is applicable to the proof, and which asserts a correct legal proposition in appropriate terms. Such refusal stamps the charge with the idea of illegality, or im-

propriety of some sort, and, though it may afterwards be given substantially, devolves upon the jury the process of reasoning, and inference, to ascertain whether that given is an equivalent for that refused, and after all, leaves the question still to be solved, why the refusal?

The principle of the rule was asserted by this court under its first organization, in 5 Stew. & Por. 330; and subsequent decisions have applied it more stringently, which is some evidence to my mind of its utility.—See Maynard v. Johnson, 4 Ala. 116; Ivey v. Phifer, 11 ib. 535; Clealand v. Walker, ib. 1059; Hinton v. Nelms, 13 ib. 222; Cole v. Spann, ib. 537; Phillips v. Beene, 16 ib. 720.

It is a maxim which I think we ought not to violate, "that the practice of the court is the law of the court."—3 Bulst. 53; Broom's Legal Maxims, 57; Bonill v. Wood, 2 M. & S. 25; 15 East. 226; 11 Mees. & Wels. 690. I can see no reason for departing from this established practice. It but affords to counsel who study the law of their case an opportunity of presenting it before the jury, couched in such terms as in their opinion will give it effect, and leaves the court perfectly free to give other, and further charges, explanatory of those given. If the court assents to the legal proposition contained in the charge, the jury should be so informed, and the charge should not be refused. If the language in which the charge is couched is inapt, or otherwise improper, (I say nothing of gross language, which I am not allowed to presume any counsel will use,) this should furnish no excuse for refusing the charge, thereby impressing the jury with the belief, that the charge was denied because it failed to assert a correct legal proposition. The charge as to the law should be given, and the language corrected.

But I shall add no more on this point, and will turn to the consideration of the qualifications superadded to the charges asked.

9. The court, by the qualifications given, with the charges prayed, substantially asserted the law to be—1. That although the defendant honestly believed the plaintiff was guilty of the offence charged, and acted upon such honest conviction, yet if there was a want of probable cause, such belief would not excuse the defendant, unless "it was founded on facts and circumstances which would create such belief in the minds of honest

and reasonable men." 2. So neither should the defendant be acquitted although he acted entirely without malice, if no probable cause in fact existed, and he failed to use such precaution as a prudent man would use to ascertain that fact, but that in such case malice would be inferred from the want of probable cause.

In Chandler v. McPherson, *et al.*, (11 Ala. 916,) the court, after an examination of numerous authorities, say: "It may be safely affirmed as a general rule, that although the defendant in an action for malicious prosecution may not be able to show a probable cause for prosecuting the plaintiff, or the plaintiff may prove a state of facts from which the want of it is inferrable, yet if the defendant acted under an honest belief that the plaintiff was guilty of the offence for which he was charged, no recovery can be had against him."

As to the qualification when applied to the first charge, we are not prepared to say that it is wrong, notwithstanding the charge itself is in the language of the decision just above referred to. That case lays down the general rule, but the Chief Justice does not inquire as to the qualifications to which it should be subject in its application to cases differently situated from that before the court. It will never do, as we have above intimated, to hold that a belief of the plaintiff's guilt, founded upon the caprice, prejudice, or the idle dreams of the prosecutor, in the absence of all facts and circumstances which would generate such suspicion of guilt in the mind of a reasonably prudent man, will exonerate the party from liability. The books abound with cases to the contrary. I will not swell this opinion by commenting on them, but will content myself by merely citing them.—See Brooks v. Warwick, 2 Starkie's R. 389, per Lord Ellenborough; S. C. 3 Eng. Com. Law R. 396; Rice v. Ponder, 7 Iredell's L. R. 390—396, per Ruffin, C. J.; Foshay v. Ferguson, 2 Denio, 617, per Bronson, C. J.; Travis v. Smith, 1 Penn. State R. 234—237, per Sergeant, J.; Faris v. Starke, 3 B. Mon. 4; Wood v. Weir & Sayre, 5 ib. 544; per Justice Story, in Wiggin v. Coffin, 3 Story's 1—7; 13 Me. 439; 6 Mo. 37. To these many other cases might be added. Indeed, we do not understand the case of Chandler v. McPherson to hold a different doctrine. The prosecutor, it is there said, must have an *honest* belief of the party's guilt, which would not imply a belief

founded upon insufficient evidence, although that evidence might not in legal contemplation amount to probable cause.

As to the application of the qualification to the general charge, which assumes the prosecutor's innocence if he acted without malice, we think the court did not err in its opinion of the law. The remarks applicable to the prosecutor's belief and the cases cited equally apply to this charge. If the prosecutor acts wantonly, rashly or wickedly in charging another who is innocent, he is presumed in law to act maliciously, and justly chargeable with the consequences. On the other hand, as absolute certainty is not attainable in human affairs, and we are daily called upon even in our most important concerns, to act upon probabilities, the law, which is adapted to the nature and position of man, exacts no more from one who institutes criminal proceedings, than that reasonable and prudential caution which the safety of others demands, and where that exists, does not make him responsible for the event.—Per Sergeant J. in Travis v. Smith, 1 Penn. State R. 237. It is the policy of the law to encourage the use of rational, inoffensive means of detecting the guilty, and hence it affords protection to those who, in the fair use of such means, are led to suspect and even to prosecute, in good faith, those who may turn out to be innocent.—Per Marshall, J., 3 B. Mon. 6.

The court are unanimous in the conclusion that the charges given correctly laid down the law for the guidance of the jury. The only difference of opinion is, that the charges asked and refused, being conceded to be correct, I think should have been given, *as asked*, according to our previous practice. But my brethren being of a different opinion, the judgment must be affirmed.

(Note.) A re-hearing of this case was granted on the point of practice raised by the refusal of the court below, to give a charge in the language requested by the counsel, and the following opinions were afterwards delivered.

DARGAN, C. J.—In the case of Cole v. Spann, 13 Ala. 537, I expressed my opinion upon the question submitted in this case for re-argument. I there said, if the charge given is not in the language of the charge requested, yet if it be a full and a fair exposition of the law, not calculated to mislead the jury, the judgment ought not to be reversed. I have with due respect

to the previous decisions of this court, and a proper regard for what I suppose to be the opinion of a majority of the bar, re-examined the opinion I then expressed, and I may add with a desire to be convinced that I was then in error; my reflections and examination, however, have ended in satisfying my mind that the opinion there expressed is correct, and I am constrained from a sense of duty to adhere to it.

The instructions of the court to the jury ought always to reach the substance and justice of the case, according to the rights of the parties as ascertained by law; when this is done, the duty of the court is performed, and the language employed, if calculated to explain the law, and enable the jury to apply the principles that govern the case, cannot in reason or justice be important or afford just ground for reversal.

I admit that a judge should be cautious in departing from the language of a request for instructions, and should never employ different language in directing a jury as to the law, unless the language which he employs is equally as clear and explicit as the language in which he is requested to give the instructions. But to hold that in all cases he is bound to use the precise language in which he is requested to give the charge, will often lead to the reversal of judgments, when the justice of the case has been reached, and no injury done to the party complaining of error. Yea, even when the language employed by the court is calculated to place the rights or the defence of the party in a more clear and favorable point of view, than the language in which the charge was requested, still we should have to reverse the judgment, not indeed, because of any error in law, or because any injury was done to the party excepting, but because the court did not use the language employed by the counsel in requesting the charge to be given.

In the case of Rives & Mather v. McLosky, 5 Stew. & Por. 330, it was held, that if a party in point of law is entitled to a particular instruction, and the court refuse to give it upon request, it is error, although afterwards the court should give a direction that by argument and inference may be pressed to the same extent. This is the language of Judge Story in the case of Livingston, et al. v. The Maryland Insurance Company, 7 Cranch, 544. I fully approve of the principle of practice recognized by these cases, and think that when the court departs

from the language employed in making the request, it should be certain that the language employed in giving the charge is equally as appropriate, plain and simple, not calculated to mislead the jury, or to impress upon their mind that the principle of law requested to be given is denied by the court. But when the charge as given is clear and appropriate to the evidence, and places the case in a proper light before the jury, there can be no error, and the judgment should not be reversed.

Within the last few years, this court has on several occasions announced the stringent rule, that the charge given must be in the language requested, and if not it is error, although the same principle of law is announced in equivalent terms. But I do not believe that any other State in the Union has adopted or recognized such a rule of practice, and we should look in vain into the English cases to find authority to support such a proposition. I cannot think that it will be productive of any good to adhere to such a rule of practice. It would be to adhere to language at the sacrifice of principle and substance. It is true, I would not consent to depart from decisions, though erroneous, if such decisions were calculated to become the source of title to property, or even a rule by which the acts and conduct of men may have been governed in their business transactions; but when such decisions can be productive of no good, and no injury can result from overruling them, and returning to correct principles, I feel fully justified in doing it, believing that benefit will result from overturning them, whilst an adherence to them would be productive of injury alone.

As I am clear in the opinion that the recent decisions of this court upon this question are erroneous, and that the principle of practice which they sanction has been, and will continue to be productive of more injury than benefit, it becomes my duty to aid in overruling them.

PARSONS, J.—The statute does not require the court to charge in the language proposed by the counsel; nor have we been referred to a single English or American case which goes that length, with the exception of some recent cases in this court. In my judgment the latter are very inconsistent with the general disposition of this court, which has probably gone even too far, to require nothing very nice or technical in pleading or practice,

and very inconsistent also with the established rule, not to reverse even for an admitted error, unless it might be injurious. A practice that requires the court to charge in the identical language proposed from the bar, if free from legal error, is in my opinion a bad practice, because I think it must lead to novel questions and to uncertainty in judicial proceedings, without affording any substantial benefit. All that ought to be required of the court, is to charge the law of the case. But if it must adopt the language proposed, that language may in the opinion of the court be ill adapted to the understanding of the jury, and calculated to confuse or to mislead them, although upon close and deliberate examination, it might be free from legal error or objection. Indeed, the judge may not, in the haste with which business is often done on the circuits, himself be able clearly to comprehend the language proposed to him. The language in which he is called upon to charge the jury, may be gross or offensive, and yet free from legal error. What in such cases is the judge to do? It will, perhaps, be conceded that in each of the cases supposed the language may be so exceptionable, that the judge may refuse to employ it in his charge. Then let us suppose that he gives substantially the charge desired, but in his own language, refusing the language proposed, and that this is assigned here as error. What is the question before us, but one of "empty sound?" Shall we reverse? If so, it is for no injury, and I must think for no error. But if we reverse for a difference of mere words, we act rather as critics of language, than as a court of errors in matters of law. For example, if the judge should decline the language because it was gross or offensive, then the question for us would be, is it so gross or offensive, that the judge should be excused for declining it? It is evident that such a practice may lead to such questions, and that it will introduce new subjects of judicial investigation, and increase the uncertainty of results. The practice from which this court lately departed, was a tried and safe practice, and I concur with the Chief Justice in a disposition to return to it. There can be no injury to any one in doing so. At most, a party can lose the chance of a reversal for a mere difference of words. If there is a real error shown by his bill of exceptions, of that he will have the full advantage, notwithstanding our return to the former practice.

HENDERSON *vs.* HAMMOND.

1. If two or more persons are bound jointly, but not severally, and one is sued alone, he can only take advantage of the non-joinder of the others by plea in abatement, and cannot insist on the omission under the general issue.
2. The plaintiff was employed as a school teacher by the defendant and others, by a written contract which specified the duties of the teacher, the rate of tuition, and the number of scholars to be sent by each subscriber. The school was to be taught in the school house belonging to the sixteenth section. Soon after the commencement of the school, an election for trustees of the township was held, at which election the plaintiff voted. *Held*, that the plaintiff was responsible for his conduct to the subscribers only, and that the trustees had no right to control or govern the school.

Error to the Circuit Court of Butler. Tried before the Hon. Geo. Goldthwaite.

Assumpsit by Hammond against Henderson, on a written contract, executed between the plaintiff on one part, and Henderson and others on the second part, by which the plaintiff was employed to teach a school for the term of one year, and Henderson and the other subscribers agreed to send to the school the number of scholars affixed opposite to their names. The contract expressed the duties of the teacher, and the rate of tuition, and the defendant agreed to send five scholars. The school was to be taught in the school house belonging to the sixteenth section. Soon after the commencement of the school, an election for trustees of the township was held, at which election the plaintiff voted. Complaints were made to the trustees against the plaintiff, on account of which there was a disagreement between them. "The plaintiff refused to be governed by the action of the trustees, and denied their right to control him. The said trustees thereupon discharged him as the teacher of said school, (which was shown to be the sixteenth section school, but plaintiff never received any of the sixteenth section fund.) From that time defendant ceased sending his children to the school, though the proof tended to show that plaintiff continued to teach during the period stipulated by the articles of agreement." The defendant asked the court to charge the jury:

First, that the written contract created a joint obligation on the part of the subscribers, and secondly, that under the evidence above set forth, the trustees were the proper judges (as between the plaintiff and subscribers,) of what was a proper cause for which to discharge him from the school, and that if the trustees did discharge him, then the plaintiff could not recover. The court refused to give these charges, and the defendant excepted.

WATTS & JACKSON, for plaintiff in error:

1. At common law, suit must be brought against all the parties to a joint contract.—1 Chit. Plead. 42.

2. The contract here sued on is not such a contract as is authorized to be sued on separately under our statute, (Clay's Digest,) if it be joint.—Tindall v. Collins, 2 Por. 17; Saffold v. Thompson, 2 Stew. 494.

3. Is it a joint contract? "The rule is that several persons contracting together with the same party for one and the same act shall be regarded as jointly, and not individually or separately liable, in the absence of any express words to show that a distinct as well as entire liability was intended to fasten upon the promisers."—1 Chit. Plead. 41; Bacon's Abridgment, Title Obligations, (D.) 4.

4. Where this appears on the record, this may be taken advantage of on writ of error.—See Chitty's Pleading.

5. This was a sixteenth section school. The teacher submitted himself to the direction of the trustees. The trustees discharged him; thereby determining that he had committed a breach of his contract. The second charge therefore ought to have been given. At any rate, the plaintiff was not entitled to recover more than for the time he taught before he was dismissed by the trustees.

JUDGE, *contra:*

1. The contract sued on is not a joint, but a several one; or it may be a joint and several one. This phraseology coupled with the separate signature of each subscriber, and the number of scholars set opposite the name of each that each was to be bound for, makes the promise on the part of each a several one. For each is a distributive adjective, and denotes two things taken separately, or every one of any number taken singly.

2. But conceding the contract to be a joint one, and yet it

will not aid the plaintiff in error, in the present aspect of his case. For the non-joinder of a party who ought to be made a co-defendant, can only be taken advantage of by plea in abatement. 1 Chit. Plead. 46-47; see also Jones v. Pitcher, 3 Stew. & Por. 135; Bonner v. Greenlee's Heirs, 6 Ala. 411. It is said by Chitty however, (see 1 Chitty, *supra*,) that if it expressly appear upon the face of the pleadings, that the party omitted is still living as well as a joint contractor, the defendant may "demur, move in arrest of judgment, or sustain a writ of error." In reply to this we say, it does not here expressly appear on the face of the pleadings, that parties omitted were joint contractors and are still living; but even if it does, the defendant did not demur; and he could not have arrested the judgment, nor can he sustain his writ of error on this ground, because our statute says, "no cause shall be reversed, arrested, or otherwise set aside after the verdict or judgment, for any matter on the face of the pleadings not previously objected to: *Provided*, the declaration contains a substantial cause of action, and a material issue be tried thereon."—Clay's Dig. 322, § 53; see also Kent v. Long, 8 Ala. 44.

3. The court below did not err in refusing to give the last charge requested, as shown by the bill of exceptions. The contract of Hammond was not made with the trustees, and the record shows it was made before any trustees were appointed. Hammond was bound to each of the subscribers on his contract, and the election of trustees, subsequent to the making of the contract, did not rescind the contract; and the discharge of Hammond by the trustees did not, and could not, release him from liability to each subscriber on the contract.

DARGAN, C. J.—This suit was brought on an agreement by which the plaintiff was employed by the defendant and others to teach a school for the term of one year. The agreement specifies the duties of the teacher and the rates of tuition agreed to be paid for each student. The name of the defendant was subscribed to the articles of agreement, and opposite thereto was affixed the figure 5, intending to denote the number of students he engaged to send. The suit is brought to recover for the tuition of these five; and the defendant requested the court to charge the jury, that the agreement created a joint obligation on

all the subscribers, and therefore, the plaintiff could not recover against the defendant alone, which charge the court refused to give. We should be disposed to hold that the agreement created a several obligation on each subscriber to pay the tuition of those children he agreed to send to the school, and no more. But if the contract could bear the construction that each subscriber was bound for the tuition of each student agreed to be sent, still it could not avail the defendant, for the rule is well settled, that if two or more be bound jointly, but not severally, and one alone is sued, he can only take advantage of the non-joinder of his co-contractors by plea in abatement, and cannot insist upon such omission under the general issue in bar of the action.—Chitty's Plead. 46; Jones, et al. v. Pitcher, 3 Stew. & Por. 135. Whether or not, there may not be cases in which such an omission would be fatal on a motion in arrest of judgment, or on error, it is needless to inquire; for even if such cases may exist in consequence of the declaration showing that there are other joint contractors who are still living and amenable to the jurisdiction of the court, it is nevertheless evident, that the defendant who is sued cannot take advantage of their non-joinder on the trial before the jury, to defeat the action on its merits.

The second instructions requested by the defendant the court also refused to give, and we think with equal propriety. This school, though it appears to have been taught on the sixteenth section, was certainly not subject to the control of the commissioners or trustees of the sixteenth section. The teacher was not employed by the trustees, nor could he look to them for payment; he was employed by the subscribers to the agreement, which specified his duties. To the subscribers alone was he responsible for his conduct, and the trustees of the sixteenth section had no right to control or govern the school. Whether they could have interfered, and prevented the plaintiff from teaching on the sixteenth section, is a question not necessary to notice, for the school was taught during the year in pursuance of the articles of agreement, and the subscribers are bound to pay according to their contract.

There is no error in the judgment, and it must be affirmed.

GARRETT & HILL *vs.* LOGAN.

1. In debt on bond, the breaches assigned, whether in the declaration or by a replication, must show that the plaintiff has a cause of action.
2. An action of debt on an injunction bond cannot be maintained to recover damages occasioned by the suing out of the writ, unless the injunction was sued out vexatiously.
3. The record of the chancery suit in which the injunction was sued out is admissible, but not conclusive evidence, as to the vexatious suing out of the writ.
4. An action may be maintained on an injunction bond without a previous action on the case to ascertain the damages occasioned by the vexatious suing out of the writ.
5. Counsel fees necessarily incurred, in the defence of an injunction suit, may be recovered in an action of debt on the bond, though they may not be actually paid.

ERROR to the Circuit Court of Bibb. Tried before the Hon. John D. Phelan.

THIS was an action of debt by Logan against Garrett & Hill, on an injunction bond executed by them, the condition of which, after reciting that Garrett had applied for and obtained an injunction in a certain chancery suit, against Logan and one Carter, continues thus: "Now if said Garrett shall well and truly prosecute his said writ of injunction, and pay all damages and costs occasioned to said defendants by the vexatious suing out of said writ, then this obligation to be void," &c. Three breaches are assigned in the declaration. 1. That said Garrett did not well and truly prosecute said injunction and pay all damages and costs thereby occasioned to said plaintiff and Carter. 2. That said Garrett did not well and truly prosecute said injunction, but wholly failed so to do, and said injunction was, on the 1st June, 1848, in due course of law dissolved, and the bill in chancery filed to obtain the same dismissed. 3. That said injunction was sued out to restrain plaintiff and said Carter from running a certain ferry boat across the Cahawba river, by means whereof they were prevented from running said boat for a long time, whereby they sustained great damage, and were put to great trouble and expense in employing solicitors and procuring

testimony in and about making their defence to said injunction suit, all which sums defendants were bound to pay, but wholly failed so to do.

The defendants demurred to each breach assigned, and their demurrer was sustained as to the first and second breaches, but overruled as to the third. They also pleaded, 1. *Nil debet.* 2. No damages were occasioned by the vexatious suing out of said injunction. 3. Said injunction was not sued out vexatiously. 4. Performance. Plaintiff demurred to the second and third pleas, and his demurrer was sustained. Issue was taken on the first and fourth pleas, and a verdict and judgment rendered for the plaintiff.

H. Davis, for plaintiff in error, made the following points:

1. The action was prematurely brought. There should have been a previous action on the case to ascertain the damages.—Herndon v. Forney, 4 Ala. 248; Donnell v. Jones, 13 ib. 490; Davis v. Gully, 2 Dev. & Bat. 360.

2. The declaration is bad. It does not aver that the injunction was sued out vexatiously. The third breach assigned is not such a breach as could arise under the condition. The obligors only bound themselves to pay the damages occasioned by the vexatious suing out of the writ, not the loss of profit, or cost of defending suit.

3. The third plea was good.—Marshall v. Betner, 17 Ala. 832.

4. Attorney's fees can only be allowed when actually paid.—Kornegay v. White, 10 Ala. 255; Marshall v. Wood, 16 ib. 806; Marshall v. Betner, 17 ib. 832.

I. W. Garrott, *contra.*

PARSONS, J.—The demurrer to the third assignment of breaches was overruled. There was error in this, we think. When breaches are assigned, either in the declaration, or by a replication, it must appear that the plaintiff has a cause of action, as in Gainsford v. Griffith, (1 Saunders, 60.) The plaintiff below, in his declaration, set out the condition, and assigned breaches, and the question is, whether he made it appear that he had a cause of action? It no where appears by the declaration that the injunction was sued out vexatiously. Without

this, there could be no cause of action. The action is founded on the bond and condition. According to the condition there was no right of action, either for costs or damages, but such as might be occasioned by the vexatious suing out of the injunction, a fact which is not averred. It is clear that the question whether the injunction was vexatiously sued out, was not directly in issue in the chancery suit, and consequently the record of that suit was not conclusive of the fact.

The third plea of the defendants below was, that the injunction was not vexatiously sued out; to which the plaintiff demurred, and his demurrer was sustained. In the analagous cases of suits for wrongfully or vexatiously suing out attachments, this court has settled various questions. In Marshall v. Betner, (17 Ala. 832,) it was held that a plea to an action on the case for wrongfully and vexatiously suing out an attachment, which avers that the attachment was not sued out wrongfully, maliciously, or vexatiously, or without reasonable or probable cause, presents a substantial defence to the action, and is not demurrable. If the plaintiff below should so amend his declaration as to render it necessary for the defendants to plead, the third plea can be amended so as to correspond with the opinion of the court in Marshall v. Betner.

It is contended that the plaintiff below brought this suit prematurely; that he should first have brought an action on the case to ascertain his damages, and then an action upon the bond; but we are not of that opinion. The counsel relies on Davis v. Gully *et al.*, 2 Dev. & Bat. 360. That case is, however, so plainly distinguishable from this, in respect of the necessity of a previous suit, as to render any remark unnecessary. But, although we think an action on the bond in the first instance was sustainable, yet it is clear that most of the law relative to actions on the case for such and similar wrongs must apply when the action in the first instance is on the bond. The measure of damages in general should be the same, and the action must be subject to the same defences, except in matters of form. In Davis v. Gully, *et al.*, (2 Dev. & Bat. 360,) it was determined that "a bond with a condition to be void upon the payment of such damages *as might* be recovered of the principal obligor for wrongfully bringing a suit in equity against the obligee, is a guaranty that the principal shall be able to satisfy any judg-

ment obtained against him, in an action on the case for wrongfully filing the bill; and no action can be brought on such bond until the obligee has obtained such judgment and failed to procure satisfaction." That was a bond for the payment of such damages as might be recovered, meaning, as the court thought, by an action on the case. In the case before us the bond was simply to pay all costs and damages occasioned to the obligees by the vexatious suing out of the injunction. Hence the distinction between that case and this, in that respect, is obvious. In Davis v. Gully, *et al.*, Gaston, J., observed: "We hold also, that the words 'for wrongfully bringing suit in the court of equity,' must be interpreted as the analagous words in the condition of an attachment bond have been interpreted—the bringing of a suit maliciously, and without probable cause.—Williams v. Hunter, 3 Hawks, 345. It would be premature in us to decide what evidence would be demanded of the plaintiff in an action on the case, to sustain the allegation that the bill in equity had been instituted for the purpose of oppression and wrong; but we perceive no more difficulty in establishing the allegation, if true, than there was in the case of Hackney v. Mathews, which was brought for maliciously impleading the plaintiff in the Ecclesiastical Court, (1 Vent. 86; 2 Inst. 562,) or in the case of Brown v. Chapman, for maliciously suing out a commission of bankruptcy.—1 Black. Rep. 427. An action on the case lies against any person who maliciously and without probable cause, prosecutes another before any tribunal, and thereby subjects him to an injury, either in his person, property, or reputation. The purpose of the bond in this case was to secure the plaintiff against the inefficiency of this common law remedy, if the complainants in the suit in equity should be unable to respond the damages."

Should the pleadings be hereafter adapted to the case of a malicious and vexatious use of the injunction, the chancery record, as has been mentioned, will not, by itself, be evidence conclusive of the vexatious or malicious purpose of the defendant. But that record will be admissible, and other evidence may or may not make it sufficient upon the questions of malice, of probable cause, &c. It would be entirely premature now to decide those questions, knowing nothing of the evidence, *pro* or *con.*, which the parties will offer.

As to the expense of the plaintiff below, in employing counsel to defend the chancery suit, it was held by this court that "in cases where malice is the gist of the action, and vindictive damages recoverable, fees paid to counsel in defending against the wrongful act of the defendant, if reasonable and necessarily incurred, may be proved and considered by the jury in the assessment of damages."—Marshall v. Betner, *supra*. This demand is not to be influenced by the question whether the fees had been actually paid. If contracted to be paid, it is enough, provided it was necessary to do so. As to the opinions of the Circuit Court in reference to the charges and refusals to charge, I have particularly examined them, but in view of the actual and full case presented by the entire record, I am not satisfied that there was any error; but in the event of a change of the state of the pleadings and evidence, the matters in relation to which the court charged and refused to charge, may not be decisive of the case—therefore, we forbear any opinion.

The judgment is reversed and the cause remanded.

JOHNSON *et als. vs.* CULBREATH.

1 A. testator bequeathed a negro girl and her increase to his grand children, and provided that the negroes should remain undivided until the youngest child arrived at the age of twenty-one years, and should then be divided among those who were living. A division was made among the children before the youngest had attained his majority, and he afterwards filed a bill to have the division set aside, alleging that he had not received an equal share with the others. *It was held*—

1. That the bill would not be dismissed by the appellate court on account of a formal defect in not offering to account for the negroes which the complainant had received, the objection not having been taken in the primary court.
2. That the negroes were exempt from execution at law against any of the legatees, until the youngest child had arrived at the age of twenty-one, and a division had been made pursuant to the will.

3. That until that time, the marital rights of the husband of a *feme covert* legatee did not attach, although he had possession of some of the negroes as bailee.
4. That one of the legatees who disclaimed all interest in the negroes, having sold his interest to another legatee before the division was made, was a competent witness for the complainant to prove his minority at the time the division was made.

ERROR to the Chancery Court of Benton. Tried before the Hon. D. G. Ligon.

BELSER & HARRIS, & J. B. MARTIN, for plaintiffs in error.

RICE & MORGAN, *contra.*

CHILTON, J.—This bill was filed on the 12th day of June, 1847, by Niven D. S. Culbreath, to set aside a division made of certain slaves on the 1st day of January, 1846, which slaves had been bequeathed to the children of Barbara Culbreath, by the will of their grand father Malcolm McPhail, late of Cumberland county, in the State of North Carolina, on the ground that at the time said division was made, the complainant lacked some twelve months of being twenty-one years of age, and that the share which was allotted to him was not equal in value to one-fifth of the entire property, to which he was entitled. It appears that the legatees interested agreed on the division, and that the slave assigned to the complainant was received by him, and was in his possession when he exhibited his bill.

Mrs. Johnson claims to be a *bona fide* purchaser of one of said slaves under an execution against the party to whom said slave was allotted by said division. The will of McPhail requires that the slaves shall remain undivided among the legatees, until the youngest of them arrives at age; the complainant in the bill being the youngest. The complainant does not deny that the division was made by his consent, but he avers that the same "was partial in its character, unequal and not designed to be final, and not committed to writing; that all the legatees were not present when it was made, and that the girl assigned to complainant lacked $300 of being equal to one-fifth the value of all the slaves to be divided."

The complainant, although he states in his bill that he has the slave assigned him in the division, makes no proposal to

bring her forward, nor to account for hire; and the testimony of Caldwell Sublett, David B. Crider and Neal Furguson shows very satisfactorily that since the division, in a legal controversy respecting a portion of said property and the legality of said division, the complainant, on his examination as a witness touching these facts, stated that he was twenty-one years old when the division was made, and that he was satisfied therewith. Sublett swears positively to this fact, and the other witnesses named corroborate his testimony. It does not appear, however, that Johnson was at all influenced by any such representations to make his purchase, or that his purchase was subsequent to the time they were made. Nor does the record show that any action was taken, based on such statements, so as to make the declarations operate as an estoppel upon the complainant.

As to complainant's failure to make a formal tender of his readiness to account, and to have the slave in his possession forthcoming, we should be inclined to hold that had such failure been made the ground of demurrer by specific objection, the demurrer should have been sustained and leave given to amend. But it does not appear to have been one of the grounds insisted on in the court below, nor is it mentioned in the demurrer. It would be opposed to the uniform practice of this court to dismiss the bill for a formal objection, which, so far as the record discloses, is sprung for the first time in this court, and which, if made in the court below, could have been readily avioded.

Aside, however, from this view, the decree of the learned chancellor disposes of the case as though the bill contained the proposal to submit the property in possession of the complainant to the disposal of the court, with its issues and profits, and should the complainant fail to have such property forthcoming, to abide any decree or order the chancellor might make, it would be entirely competent for the chancellor to dismiss his bill; for the object of his bill, which is for an equitable division of the whole property, could not be made without the production of the property in his possession.

We have examined with much care the authorities relied upon by the counsel for the plaintiffs in error, as showing that the decree of the chancellor was erroneous; but we feel satisfied that they do not sustain the proposition to which they are cited, to the extent contended for.

These slaves were "to *remain undivided*" among the children of Flora Culbreath, until the youngest child attained his majority, when they were to be equally divided among those of the children who survived until that period. It was then the duty of the executor to see that this provision in the will was carried out, and it appears that up to the time of the alleged division, he controlled the slaves either by himself or others.

Until the youngest child arrived at age, the executor had no power to make the division among the legatees; for until that period arrived, it could not have been determined who were the persons to take, the right depending on the survivorship; and until that period no such interest could vest in Barbara Cannon, one of the legatees, as would go to her husband upon her decease, or to his representative upon his death. So long as the slaves in contemplation of law remained in the hands of the executor, awaiting the arrival of the period when they were to be divided, and the respective shares to vest in possession of the legatees according to the will of Malcolm McPhail, just so long are they exempt from execution at law, nor can the marital rights of the husbands of the *feme covert legatees* attach. The proof in the cause sufficiently shows that the complainant was not of full age, until February, 1847, before which time no division could lawfully have been made, and anterior to which period, Barbara Cannon's right of survivorship attached, her husband having died in 1844. It is very clear then, that her husband acquired no right to this property. If his possession was otherwise than that of a bailee of the property, it was tortious and acquired in violation of law, as well as of the express provisions of the will of McPhail, and such possession would not entitle him *jure mariti* to the property. He must have held the property as husband, and not on hire, as the proof shows he held in this instance.—Terrell v. Greene, 11 Ala. 216; Andrews & Brothers v. Jones, 10 Ala. 426; Mayfield v. Clifton, 3 Stew. 375; Bibb v. McKinsley & Hopkins, 9 Por. 636; Vanderveer v. Alston, 16 Ala. 494; Randall v. Shrader, 17 ib. 338. These cases from our own court very clearly show that no such interest vested in Cannon, as would justify a recovery by his administrator, and consequently the cross bill of Willis, which seeks to subrogate him to the rights of Cannon's administrator, was properly dismissed. It results also, that the chan-

cellor did not mistake the law in dismissing the cross bill of Johnson; for unless the interest of the legatees was such, as could have been sold under execution at law, Johnson could acquire no title by his purchase. His title therefore depends altogether upon the validity of the division which was made, and this we have seen was invalid by reason of the non-age of the complainant. In contemplation of law, the property is in the hands of the executor who took upon himself the execution of the trust imposed by the will, namely, to keep this property, which was not to be divided among the children to whom it was bequeathed until the youngest arrived at full age, at which time the survivors of them should share it equally in severalty. Till then, the legatees were not entitled under the will to the possession; and the constable had no power to seize and sell it upon an execution against any of the legatees, as he could not take possession of it without doing violence to the will of the testator, according to our construction of the will. The defendants in execution, at the time of the sale, had no legal interest in the property sold; if they survived until the period for the division, the defendants were then entitled to distributive shares in the slaves, but they had, as we have said, no right to the possession. This view distinguishes this case from those cited, which show that the interest of one tenant in common may be sold under execution at law.

As to the deposition of Elijah Culbreath, the only one objected to before the chancellor, we are clear in the opinion that he was a competent witness to prove the facts to which he deposes. If he had any interest, as is well remarked by the chancellor, it was opposed to the party who introduced him. He was in other words interested in sustaining the division which had been made, as by it he got a greater interest than he can get under an equitable division which the court is called upon to make. But he explicitly states that he has no interest, having disposed of all his interest in 1844, some three years before the bill was filed.

We have been unable to see any error in the decree of the chancellor. It is consequently affirmed.

WEST & WEST *vs.* KELLY'S EX'RS.

1. The rule is inflexible, that if a written instrument is perfect and complete of itself, parol evidence cannot be received to add another term to it, or to change its legal effect.
2. If it is apparent, however, that the written instrument contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract.
3. But the parts of the agreement proposed to be proved by parol must not be inconsistent with, or repugnant to the intention of the parties as shown by the witten instrument.
4. In assumpsit on a promissory note purporting to be given for professional services to be rendered in future by the payees as attorneys at law, but payable at a day certain, parol proof is inadmissible to show that it was the agreement of the parties, that the note should not be paid unless the payees were successful in the suit for the bringing of which it was given.
5. The court is not bound to separate legal from illegal evidence when both are offered together, but the whole may be rejected.

ERROR to the County Court of Pickens.

ASSUMPSIT on a promissory note executed by the plaintiffs in error, of which the following is a copy: "For and in consideration of services to be performed by H. W. Ellis and Isham H. Kelly, attorneys at law, &c., in a certain suit in chancery hereafter to be instituted in our behalf against David Sloan to remove him as trustee, &c., we promise to pay to them on the first day of January, A. D. 1842, the sum of two hundred dollars. Carrollton, Ala., Dec. 4, A. D. 1840," signed by the defendants. On the trial, the defendants offered to prove by a witness that the note was not to be paid, unless the payees were successful in the chancery suit spoken of, and that they were not successful. The evidence was excluded by the court, to which the defendants excepted.

HUNTINGTON, for the plaintiffs in error, cited Self v. Herrington, 11 Ala. 489; Givhan v. Daily's Adm'r., 4 ib. 336; Cutter v. Powell, 2 Smith's Leading Cases, page 1 and notes.

E. W. PECK, *contra*.

DARGAN, C. J.—The general rule is admitted by all, that parol proof cannot be received to add to, detract from, vary or contradict a written contract. But the application of this gen-

eral rule to each particular case is frequently a task of difficulty, and has given rise to as many contradictory decisions, as any question with which courts have had to deal. If the instrument is perfect and complete, that is, if it contains the entire contract, then the rule is inflexible that parol evidence cannot be received to add another term to the written instrument, or to change its legal effect.—3 Starkie on Ev. 1006; Cowen & Hill's Notes to Phil. Ev. 1471; Litchfield v. Falconer, 2 Ala. 280; Paysant v. Ware & Baringer, 1 ib. 161; Beard v. White, 1 ib. 436; McCay v. Moss & Newberry, 5 Por. 88. But if it be apparent that the instrument in writing contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract, otherwise the contract could not be brought before the court.—Cowen & Hill's Notes to Phil. Ev. 1471–2–3. But the parts of the agreement proposed to be proved by parol must not be inconsistent with, or repugnant to, the intention of the parties, as shown by the written instrument; for, to receive parol proof of a part not reduced to writing, which is directly repugnant to the intention of the parties, as expressed in the written instrument, would at once annul the rule that parol evidence cannot be received to contradict or vary the terms of a written agreement.—Jeffrey v. Walton, 1 Starkie, 267; Cowen & Hill's Notes, 1472.

Applying these general rules to the instrument sued on, and to the parol proof offered by the defendants, which was rejected by the court, I can perceive no error. The note shows upon its face that it was given for professional services, to be afterwards rendered, but it is payable at a time certain, and is, in legal effect, a promissory note. The parol proof, however, tended to show that it was the agreement of the parties that the note should not be paid, unless the payees, who were attorneys at law, should be successful in the suit they were to bring, and for the bringing of which the note was given. To allow this proof would be to allow parol evidence to change the intention of the parties as expressed in the note. It would not only alter the time of its payment, but would show that the payment of the money, according to the contract, was dependent on a condition or a contingency, and thus the legal effect of the instrument as a promissory note would be destroyed.

But it is argued that the proof offered by the defendants was

admissible, because it tended to prove a failure of consideration. Now I admit that if the proof had tended to prove nothing else, then its rejection would have been erroneous, for there can be no doubt that parol evidence may be received to prove a failure of consideration either in whole or in part. But the proof offered by the defendant went further than this. It tended to prove that the payment of the note was dependent on the condition that the payees were successful in the suit they were to bring, and that this was a term of the contract. It was offered too, as a whole. It might, therefore, properly be rejected, for the court is not bound to separate legal from illegal evidence, when both are offered together. It is for the party himself to separate the legal from the illegal proof and offer such only as is legal. If he does not do this, but offers both legal and illegal evidence as a connected whole, it is not error to reject it.

Let the judgment be affirmed.

TURNER *vs.* FENNER *et als.*

1. The statute of frauds of this State does not apply to property brought into the State by a tenant for life holding under a deed or will executed beyond the State, although the tenant for life and the remainder men resided in this State, at the time of the execution of the deed, or probate of the will, and continue to reside here.
2. The law of the owner's domicil must in all cases determine the validity of every transfer or other disposition of personal property by the owner, whether it be *inter vivos* or *post mortem*, unless there is some positive or customary law of the country where it is situate providing for special cases, or from the nature of the particular property it has a necessarily implied locality.

Error to the Circuit Court of Lawrence. Tried before the Hon. Thomas A. Walker.

This was an action of detinue for the recovery of two slaves, instituted against Turner, in October, 1847, by Joseph F. Fen-

ner, Thomas B. Fenner, Julius Johnson and Mary, his wife, formerly Mary Fenner, and Thomas B. Fenner, who sues as next friend for Richard H., Margaret E., Ann M. and Lucy M. Fenner, minors under the age of twenty-one. The plaintiffs claimed under the will of John Howson, which they proved had been duly executed and admitted to probate in Halifax county, North Carolina, where the testator died. This will created a life estate in the property in controversy in Robert Fenner, with remainder to his children, who are the plaintiffs. It was admitted to probate in North Carolina in November, 1842. A division of the testator's estate was had in February, 1843, and in the month of April following, the negroes were brought to this State by Robert Fenner. The defendant claimed under a purchase at a sheriff's sale on the 12th March, 1846, under an execution against Robert Fenner. He also proved that said Robert Fenner and his children resided in Lawrence County, Alabama, prior to 1842, and continued to reside there until 1847, and that said will had never been recorded in this State. The court charged the jury that it was not necessary that the will should be recorded in this State, under the statute of frauds, to protect the remainder from the creditors and purchasers of Robert Fenner, to which charge the defendant excepted.

R. W. Walker and John A. Elmore, for plaintiffs in error:

1. The second section of our statute of frauds is not confined in its operation to any one or more classes of cases, but embraces every conceivable one, where the possession is with one person, either with or without an interest, and an estate, use or property, either present or future, is in another.—Clay's Dig. 254, § 2; Myers v. Peek's Adm'r., 2 Ala. 648; Bank v. Croft, 6 ib. 622; Johnston v. Bank, 7 ib. 379; Tatum v. Manning, 9 ib. 144; Cook v. Kennedy, 12 ib. 42; Felder v. Harper, ib. 612; Gressett v. Agee & Dumas, 14 ib. 354; Craig v. Payne, 4 Bibb, 337; Davidson, Ex'r. v. Nunnally, 3 B. Monroe, 534; Davidson v. Prewitt, 9 ib. 103.

This court, in construing the statute, has decided that instruments executed or interests created in another State, are not within its provisions, but the precise question here presented under the last clause of the statute has never been decided unless in one case.—Catterlin v. Hardy, 10 Ala. 514; Cook v.

Kennedy, 12 ib. 42; Adams v. Broughton, 13 ib. 747; Thomas *et al.* v. Davis, 6 ib. 121; Smith v. Ruddle, 15 ib. 28; Lyde *et al.* v. Taylor, 17 ib. 270.

Such a decision we insist cannot be sustained on principle or authority, and the question cannot be considered a settled one. The second section of the statute of frauds does not affect the validity of the contract or instrument, whether made here or elsewhere; that is not the subject of legislation. The law does not regard the mode, or manner, or place in which the transaction takes place, but its provisions apply to the possession in this State. The moment this possession begins here, the law begins its operation on the possession, and declares that the possession here carries with it all the incidents of property, and for that reason makes it the property of the holder as regards third persons. It is not a mere registry act, but a rule of property. —2 Ala. 648. It regulates the effect of the possession in this State, and this without reference to the place where the right to it was acquired or created, or where it was originally taken. It is a general principle, in fact, that the effect of the possession of personal property is regulated and determined by the laws of the State where such possession is held.

These views are fully sustained by the following cases decided on statutes identical with ours.—Beasley v. Owen, 3 H. & Munf. 456; Withers v. Smith, 4 Bibb 170; Boyd v. Stanback, 5 Munf. 305; Pate v. Barker, 7 Leigh 88; Collins v. Loftus, 10 ib. 5; McKissick v. McKissick, 6 Humph. 75; Ferguson v. White, 1 A. K. Mars. 7; Baylor v. Smither, 1 Littell 112; Davidson v. Nunnally, 3 B. Mon. 534; Fightmaster v. Beasley, 7 J. J. Marsh. 410; Blair v. Dade, 9 B. Mon. 61; Davenport v. Prewitt, 9 ib. 103; Mosely v. Williams, 3 How. Miss. 520; Lewis v. Gilmer, 3 Sm. & Mar. 560.

There may be difficulties in complying with the letter of the statute as to the time and place of registration, but the statute is to be liberally, not literally construed. Mere inconvenience cannot abrogate its provisions. It has been asked, how can the law be complied with, when the instrument has been made more than twelve months, or more than three years before the removal of the property to this State?

It is a sufficient answer to say that these are not the facts of this case. The removal here took place shortly after the bill was

made, and when such a case as the one supposed arises, it will be time enough to decide it.

But undoubtedly the correct construction of the statute is, that proof and registration, as required by its provisions, at any time within three years after the possession begun in this State, would be a compliance. This has been expressly decided in other States on statutes of which ours is a transcript, *verbatim et literatim*.—Beasley v. Owen, 3 H. & Munf. 456; Ferguson v. White, 1 A. K. Mars. 7; Baylor v. Smither, 1 Littell, 112; Withers v. Smith, 4 Bibb 170; Pate v. Barker, 7 Leigh 88; Boyd v. Stanback, 5 Munf. 305; Lewis v. Gilmer, 3 Sm. & Mar. 560; Mosely v. Williams, 3 How. Miss. 520; Collins v. Loftus, 10 Leigh 5.

The argument *ab inconvenienti* applies with more force to a mortgage executed in Georgia by a citizen of that State on personal property in this, than to the present case. But such a mortgage, it has been held, is embraced by the act of 1823. Compare the two statutes.—Clay's Dig. 255, § 5; ib. 255 § 2: Dearing v. Lightfoot, 16 Ala. 28; Beall v. Williamson.

2. But conceding the law to be as determined in Adams v. Broughton, and Lyde, *et al.* v. Taylor, and yet this case is not governed by it. Those cases simply decide that the statute does not apply to an instrument executed in another State between parties there resident, affecting property there situate, and not in contemplation of the removal either of the parties or the property to Alabama.

The laws of a State must regulate all rights and estates which, in their inception, it is contemplated and intended shall be possessed and enjoyed by its citizens, and within its jurisdiction. Estates and interests so created must be considered as made with a direct reference to the laws of the State in which they are intended to operate and have effect.—LeBreton v. Nouchet, 3 Martin, 60; Kneeland v. Easley, Meigs 620; Blanchard v. Russell, 13 Mass. 1; Hale v. N. J. Co., 15 Conn. 539; Carroll v. Remich, 7 Sm. & Mar, 798; Story Confl. Laws, §§ 180-1-2, 194, 328.

If, at the time this will was executed, the slaves in controversy had been in this State, there can be no doubt, on principle and authority, that this remainder would have been subject to the influence of the statute.—Dearing v. Lightfoot, 16 Ala. 28;

Varnum v. Camp, 1 Green N. J. 326; Story Confl. §§ 383, 390, 398, 410.

There can be no difference in legal effect between the actual presence of the property here, when the instrument is executed, and the intention of the maker that it shall be brought and held here subject to the instrument.

The present case comes within this principle. The bequest of the life-estate in these slaves was designed to take effect and be enjoyed in Alabama. It is of the essence of a gift that it shall be enjoyed by the donee somewhere. Here is a gift of a life estate in slaves, to Robert Fenner, and it was of necessity in the contemplation of the testator that it was to be possessed by him somewhere. Where? When the will was made, long before and long after Robert Fenner resided in Lawrence County, Alabama. He is described in the will as "Robert Fenner, of Alabama." The testator thus knew his place of residence, and the will was made with direct reference to it. Was it the testator's intention that the bequest was to be enjoyed in North Carolina or in Alabama? It is a universal maxim of law that "chattels follow the domicil of the owner," and the civilians say that the reason of it is, that "as movables have no such fixed and perpetual *situs* as lands have, it is necessary that their *situs* should depend on the pleasure of the owner, and that they have the very *situs* which he wishes when they have that of his own domicil."—Story Confl. Laws, §§ 377–8, 325, (d) 325, (k) 405, 362. Hence it is a natural, sensible and legal presumption, that when a man is made the owner of personal property, it is the intention of the party who makes him the owner, that he shall hold the property in the place of his domicil, and subject, therefore, to the laws there prevailing. The donor of personalty must always be presumed to intend that the donee shall hold it in the place where he lives. Not only the life estate in the slaves was given to a citizen of Alabama, but the remainder also. This strengthens the presumption that the testator intended that the bequest was to be possessed and enjoyed here.

Now here is a bequest to a citizen of this State intended to be enjoyed by him here, and held here, subject to a limitation in favor of third persons, also citizens of Alabama, which would not be valid without registration, against creditors and purchasers, if the will making such bequest had been executed in this

State. If such a case is not within the provisions of the statute, then they are worse than nugatory. If the statute does not apply to such a case, then by this law citizens of other States are made a privileged class to commit frauds upon our own citizens.

NICOLSON, *contra*, contended that if the will was properly probated in North Carolina, it is valid to pass personal property wherever situated.—Story on Confl. § 391; Swift v. Fitzhugh, 9 Port. 39; Inge v. Murphy, 10 Ala. 894; Broughton v. Adams, 13 ib. 731; Lyde v. Taylor, 17 Al. 270.

PARSONS, J.—This case has been argued upon our statute of frauds. The counsel for the plaintiff in error does not contend that there is any difference under that statute, between wills and deeds, in respect to the necessity of registration in this State. But he contends that if the property be brought into this State by a tenant for life holding under a deed, or a will, made beyond this State, the same must be recorded here according to the statute, as if the will or the deed had been made here, and the property conveyed had been here. The substance of his argument is, that the statute operates upon the possession merely, while held in this State, and its effect after three years possession here by the tenant for life, without any registration of the deed or will, is merely to postpone the remainderman to the creditors of the tenant for life, or to create a preference over the remainderman, in favor of a *bona fide* purchaser from the tenant for life—to hold otherwise, that is to exempt foreign deeds and wills from the operation of the statute, which acts upon the possession in this State alone, without violating the original title or rights of the remainderman, to the prejudice of our own citizens, and therefore not required by considerations of justice or comity. For several years I have been aware of some of the authorities upon which the counsel relies, and I have occasionally felt the force of the reasoning stated.

The reasoning is, however, not all on one side. The court of appeals of Kentucky appears, from the cases cited by the counsel for the plaintiff in error, to have held different opinions at different periods, upon the general question with respect to foreign wills. But here the proposition as a general proposition, has been repeatedly and uniformly held, that our statute does not

extend to a deed executed beyond this State, although the property may afterwards be brought and held here.—Catterlin v. Hardy, 10 Ala. 511; Inge v. Murphy, ib. 885; Adams v. Broughton, 13 Ala. 731-747 & 748; Lyde et al. v. Taylor, et al. 17 Ala. 270. In some of the cases it is suggested that there might be exceptions to the general rule, but those suggestions can have no application to this case, and therefore, we do not dwell upon them. If the general rule, which is so fully settled here, be wrong, it is better to adhere to it notwithstanding, than to violate rights which have grown up under it, as it has become a rule of property. Although the testator made his will in North Carolina, and resided and held the property there, which is now in controversy, and his will was proved and established there, (and it may be added that his executor resided and assented to this legacy there, and also, that this property was allotted on a division under a judicial proceeding there to Robert Fenner, as the tenant for life,) yet it is contended, that as Robert Fenner, the tenant for life, and his children, the remaindermen, resided and continued to reside in this State, the case should form an exception to the general rule. But such an exception, we think, would be inconsistent with the rule itself, and therefore inadmissible. The particular estate, as well as the remainder, had its inception, and was completed there. The will, the assent of the executor, &c., had complete effect there, under the laws of that State, without the slightest aid or influence of our laws. There, as has been said, the property was, and the testator lived and died. Lord Loughborough said, "It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country out of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country. In

the case of Pipon v. Pipon, Ambl. 25, a party had possessed himself of a debt which was due to the intestate, a subject of Jersey, and whose personal property was therefore governed by the law of Jersey. Lord Hardwicke was applied to by his other relations, resident in England, stating that they should be excluded from a share according to the distribution of Jersey, but that they should be entitled to a share according to the distribution of England; and they therefore prayed by their bill, that the administratrix might be restrained from taking the property to Jersey. Lord Hardwicke very wisely and justly determined that he would not restrain the administratrix, he would not direct in what manner she was to dispose of the property, or to distribute it. Having acquired the right to it, she was to distribute it according to the law which guided the succession to the personal estate of the intestate."—Sill v. Worswick, 1 H. Black. 690. As to personal property, the law of the owner's domicil is in all cases to determine the validity of every transfer, or other disposition made by the owner, whether it be *inter vivos* or *post mortem*, unless there is some positive or customary law of the country where it is situate, providing for special cases, or from the nature of the particular property, it has a necessarily implied locality, as contracts respecting the public funds, stocks, &c.—Story's Conflict of Laws, § 883. There is an exception to the general rule, of contracts made in view of the laws of another country, but that is not material here. If the property in question had been in this State when the will took effect, or if the will had required it to be brought here, the case would have been varied in its facts, but it is not necessary now to determine their effect. This case is clearly within the decisions of this court heretofore made.

The judgment is affirmed.

QUARLES *vs.* QUARLES.

1. A bill for a divorce *a vinculo matrimonii*, which alleges cruelty, abandonment and adultery on the part of the defendant, is not multifarious.
2. When a divorce *a vinculo matrimonii* is decreed in favor of the wife, it is error to decree alimony to her, instead of a division of the estate between the parties, (Clay's Dig. 170, § 8.)
3. A proposal made by the wife, but rejected by the husband, to return to his house, from which she has been driven by his cruel treatment, cannot be construed into a condonation of his cruelty.

ERROR to the Chancery Court of Wilcox. Tried before the Hon. J. W. Lesesne.

THIS was a bill filed by the wife against her husband, alleging cruelty, abandonment and adultery on his part, and praying a divorce *a vinculo matrimonii*. The bill alleged that a short time before it was filed, complainant had offered to return to her husband's house, and that her offer had been rejected by him. The chancellor granted the prayer of the bill, and also decreed alimony to the complainant out of her husband's estate.

Geo. W. GAYLE, for plaintiff in error:

This bill was filed for divorce *a vinculo*, upon three grounds, viz: cruelty, adultery and abandonment. There was a special demurrer for misjoinder of causes of divorce, which was overruled, and a decree *a vinculo* rendered, and alimony allowed.

I. The court below erred in refusing to sustain the special demurrer to the bill for multifariousness. 1. What is multifariousness? It is union of distinct matters.—See Story's Eq. Plead. 224, § 271; Chapman v. Chunn, 5 Ala. 402. 2. The grounds are distinct under our statute, the disjunctive conjunction "or" being used (see Clay's Dig. 107, § 3;) and being analogous to attachment suits, cannot be united. 3. The subject matters, (cruelty, adultery and abandonment,) are distinct, because different decrees are allowed for cruelty and adultery. The decree for cruelty may be *a mensa*, for adultery must be *a vinculo*. 1. As to cruelty.—See 3 Bl. Com. mar. p. 94; 1 ib. ch. 15, p. 432-440 & 443; Clay's Dig. 171, § 19. Upon this decree, alimony is allowed.—See Lovett

v. Lovett, 11 Ala. 763; Poynter on M. & D. 85. 2. As to adultery, 3 Bl. Com. mar. p. 94; 1 ib. ch. 15, 432-440 & 443. Upon this decree alimony is not allowed, but the estate is divided.—See Clay's Dig. 178, § 8; Lovett v. Lovett, 11 Ala. 767. This question of multifariousness for the joinder of distinct causes has been repeatedly decided.—See Pomroy v. Pomroy, 1 J. C. R. 606; Smith v. Smith, 4 Paige, 92; 1 Barber & H. Dig. 263, § 19. 4. If the bill is multifarious, it must be dismissed. See McIntosh v. Alexander, 16 Ala. 87.

II. If the special demurrer is insufficient to dismiss the bill, then the bill, upon the court's own motion, should have been dismissed for want of equity. 1. The bill alleges abandonment, and shows upon its face that complainant left defendant's house ten days only before filing bill. It don't show that defendant left for three years with intention of abandonment.—See Clay's Dig. 170, § 3. 2. The bill alleges cruel treatment, and shows upon its face that complainant was a kind, dutiful and affectionate wife, up to ten days of filing bill; and yet alleges cruel treatment to be of twenty years duration. It shows no period at which it commenced, ceased, or was renewed, and consequently shows condonation by lapse of time.—See Poynter on M. & D. p. 71, § 82; 2 Sup. U. S. Dig. 135, § 415; 4 Eccl. R. 238; 9 U. S. Dig. 271; Shelford on M. & D. 249-242. 3. The bill alleges adultery, and shows that after knowledge, she co-habited.—See Poynter on M. & D. 81; 2 U. S. Dig. 513, § 418-19-20-25. This is likewise condoned, and well may the chancellor have selected cruelty as the basis of decree. The adultery must be after abandonment, and is not so charged.—See Clay's Dig. 170, § 3. 4. The bill shows the offer of complainant to return, and this is a condonation of all offences, if any were committed.—See 2 Kent's Com. 100. 5. If there were cruelty, the wife caused it, and can't complain.—Shelford on M. & D. 241; Gray v. Gray, 15 Ala. 779.

III. The Chancery Court erred in allowing alimony upon a decree *a vinculo*. The estate should have been divided under the statute. 1. Alimony only allowed on divorce *a mensa et thoro*.—See Lovett v. Lovett, 11 Ala. 763; Poynter on M. & D. 85. 2. Upon decree *a vinculo*, the estate is divided.—See Clay's Dig. 179, § 8; Lovett v. Lovett, 11 Ala. 767. 3. Ali-

mony is never allowed unless the allegations of the bill are sustained, (not sustained as to marriage.)—See Wood v. Wood, 2 Paige, 454.

IV. The bill should have been dismissed, because there was no proof of marriage. 1. There must be proof of marriage to give jurisdiction.—See 1 Mass. 241; 2 U. S. Dig. 512, § 393; Shelford on M. & D. 337. 2. Proof of marriage becomes necessary from the acts of the Legislature. They say—1. The answer shall not be sworn to, and bill shall not be taken for confessed, and allegations must be proved.—See Clay's Dig. 170, § 6; Richardson v. Richardson, 4 Por. 467. 2. Confessions in answer shall not be received.—See Clay's Dig. 171, § 16.

T. & J. WILLIAMS, *contra*:

1. A complainant may join in the same bill two good causes of complaint arising out of the same transaction, where all the parties are interested in the same claim of right, and where the relief asked is of the same nature.—Varick v. Smith & the Attorney General, 5 Paige, 137; P. & M. Bank v. Walker, et al. 7 Ala. 927; Lewen v. Stone, 3 Ala. 485.

2. To constitute multifariousness, a bill must charge several distinct matters totally unconnected.—Chapman v. Chunn, 5 Ala. 402; Kenedy v. Kenedy, 2 Ala. 573; Coulburn v. Broughton, 9 Ala. 351.

3. The cases from New York on the subject of multifariousness in cases of divorce, are on their particular statute, and do not furnish authority of the rule under our statute. Vide Pomeroy v. Pomeroy, 1 Johns. Ch. R. 606; Revised Statutes of New York, vol. 2, 144, art. 3, § 38, and also p. 146, art. 4, § 50-51; for adultery the bonds of matrimony are dissolved; for cruelty, only from bed and board.

4. But this bill does not sufficiently charge adultery, to constitute a specific charge for relief on that ground.—Clay's Dig. 170, § 16.

The charge should be abandonment and living in adultery, which is not done. To "prevent collusion" confessions of either party shall not be received. Admission of marriage is no part of the admissions forbidden by the statute.—Vide Betts v. Betts, 1 Johns. Ch. 197, on the subject of admissions of party.

CHILTON, J.—1. It is no valid objection to this bill, that

several distinct grounds for divorce *a vinculo matrimonii* are embraced in it. The title to the relief prayed is the same whether one or the other of the several alleged grounds be proved. It is well settled that the plaintiff may aver facts of a different nature, which will equally support his application.—Story's Eq. Plead. § 254. But if we concede that the causes stated would support a prayer for multifarious relief, still in the case before us, no such relief is prayed, and consequently the objection for multifariousness must be overruled.—1 Danl. Ch. Pr. 384; Carpenter & Wife v. Hall, et al. 18 Ala. R. 439, citing Dick v. Dick, 1 Hogan's R. 290.

The cases cited from New York were predicated upon a statute of that Stafe, different from our statutes regulating divorces, and are therefore not applicable.

2. The chancellor overlooked the statute, or mistook the law, in decreeing alimony, instead of decreeing a division of the estate between the parties as required by the act.—Clay's Dig. 170, § 8.—See this act construed in Lovett v. Lovett, 11 Ala. 763. For this error, the decree must be reversed and sent back.

It is proper, however, to remark, lest the case should return upon us, that it would be well for the complainant to apply to the chancellor for leave to take additional proof of the marriage, which is not shown except inferentially. Indeed, no effort appears to have been made to prove it.

3. It is also proper to add that we have carefully examined the proof contained in the record, and are of opinion, that it furnishes no evidence of a condonation of the cruelty which is alleged in the bill, and which we think is sufficiently proved.

We have been referred to no case, and we presume none can be found, which holds that a proposition made by the wife, who has been driven by the cruel and barbarous treatment of her husband from his house, again to return, but which he indignantly spurns and rejects, shall be regarded as a condonation of his cruelty. This prudent, but rejected offer should not prejudice her rights, more especially when it does not appear that the husband has ever repented, or changed his determination to render her a perpetual outcast from his house and society.—6 Mass. R. 69.

For the error in decreeing alimony, the cause must be reversed and remanded.

WALLACE *vs.* HALL'S HEIRS.

1. When a sale of real estate is ordered by the Orphans' Court on the petition of an administrator, under the Act of 1822, (Clay's Digest, 224-5) the commissioners who are appointed to make the sale have no power to execute a conveyance to the purchaser, until a final decree has been rendered confirming their report of the sale, and directing them to convey title to the purchaser; and their deed without such final decree does not divest the title of the heirs at law.
2. If a widow, before her dower is allotted to her, convey her interest in the lands of her deceased husband, the heir at law may recover in ejectment against her alienee.

ERROR to the Circuit Court of Shelby. Tried before the Hon. Geo. D. Shortridge.

WHITE & PARSONS, for plaintiff in error:

Upon the petition filed and the court assuming to act upon it, the Orphans' Court acquired jurisdiction, and its proceedings, no matter how irregular, cannot be collaterally impeached while they remain unreversed—Wyman v. Campbell, 6 Por. 219; Duval v. McLosky, 1 Ala. 708; Calhoun v. McCartny, 11 ib. 110.

This is a sale by the court and not by the commissioners, and the test of the correctness of such sales is not the action of the commissioners, but the ratification of the sale by the court.—Jennings & Graham v. Jenkins, 9 Ala. 289; Worthington v. McRoberts, ib. 299.

The sale was made, a report made to the court, and the sale confirmed.—See Worthington v. McRoberts, cited above, p. 301. The report by a majority of the commissioners was sufficient.—9 Ala. 289; 6. S. & R. 166; 5 Bin. 481; 21 Wend. 178. The order of the court adopting the report of the commissioners and making it a part of the record was such a final decree as could be appealed from. It is analogous to a sale by a master in chancery, and when such sale is confirmed by the court, it operates a change of title.—McRoberts v. Worthington, 9 Ala. 301; Duval's Heirs v. Pl. & Mer. Bank, 10 ib. 653.

In favor of a long possession and a *bona fide* purchaser, an order of the court, if held indispensable, directing the commissioners to make the deed, will be presumed.—4 N. Hamp. 321;

3 Johns. Cases, 128; 2 Ver. 77, 85; 11 S. & R. 432; 6 Bin. 496; 11 Mass. 227; 1 McCord, 278; 3 D. & E. 152; 1 Har. & Johns. 14; 6 ib. 361; 12 S. & M. 9; 8 ib. 255, 274, 279; 1 Yeates, 118; 10 Johns. R. 377.

The court had jurisdiction, and ordered the sale, the sale was made, the money paid by the purchaser, the sale was confirmed by the court, and a deed made to the purchaser. This sale, it is insisted, is not absolutely void, but is valid until set aside by motion to the court in which the proceeding was had.—McLane v. Spence, 6 Ala. 894; Mobile Cotton Press v. Moon & McGehee, 9 ib. 679, 693; Jackson v. Roberts, 7 Wend. 88.

A widow is entitled to her husband's homestead, and the rents and profits accruing therefrom, until her dower is assigned her. It is not her duty, but the duty of the owner of the fee, to become the actor in having that done.—Shelton v. Carroll, 16 Ala. 148.

An estate in dower is a freehold for the life of a dowress. If she marry, her husband is entitled to the profits, and the sole control and management of it during their joint lives. He may therefore convey it or charge it, or it may be sold under execution against him.—11 Ala. 615.

The cases of Bonner v. Greenleaf, (6 Ala. 411,) and Lewis v. Lightfoot, (1 ib. 475,) though they may seem, from a remark of the court upon a point not necessary to be decided, to be somewhat against the title of the plaintiff in error, upon examination and comparison of the facts of the cases, will be found to be in favor of it.

E. W. Peck, with whom were Rice & Morgan, *contra*:

1. The possession of the premises by the defendants' ancestor at the time of his death, under the purchase and deed from the witness Roberson, was sufficient, *prima facie*, to entitle them to recover, as his heirs at law.—Smith *ex. dem.* Tiller v. Lorillard, 10 J. Rep. 358; Hylton's lessee v. Brown, 1 Wash. Cir. Co. Rep. 204, note.

2. The title of the defendants, as heirs at law, was not divested by the proceedings in the Orphans' Court, and the sale alleged to have been made under and by virtue thereof. There was no final decree in the cause rendered by the court upon the coming in of the report of the commissioners. All that appears

on this subject, is in the following words: "This day the commissioners appointed to sell the real estate of Glover Hall, deceased, made a report of said sale, which was received and ordered to be made of record."

This is no final decree; it did not divest the title of the heirs, or authorize the commissioners to make a deed to the purchaser. Notwithstanding this entry, the court might have set aside the sale. No writ of error could have been sued out, based upon this entry; it is, therefore, clearly no such final decree as the statute requires.—Clay's Dig. 225, § 21; Lightfoot v. Doe *ex. dem.* The Heirs of Lewis, 1 Ala. 475, 480–1; Cummings & Cooper v. McCullough, Adm'r., 5 ib. 324, 337; at this latter page, the court say, "the title to real estate sold by order of the County Court remains in the heirs of the deceased until the court decrees a title to be made to the purchaser, and the title is in fact made, notwithstanding the court may have approved the bond given with security for the purchase money.—See also Pickens' Ex'rs. v. Winter's Adm'r., 7 Ala. 864.

3. The plaintiff in error, in the court below, to defeat the action of the heirs at law, set up and claimed under a deed, for the entire premises, from Blaxton and wife, Mrs. Blaxton being the widow of the said Glover Hall, and in connection with this deed, made an abortive effort to prove that after the deed was made, on his application, the dower of Mrs. Blaxton, as the widow of Glover Hall, had been assigned to her.

The charge on this point is right on principle and authority. The widow has no estate in lands of her husband, until her dower is assigned. She has, however, a right before assignment to occupy the mansion house, out houses, improvements and plantation thereunto belonging, free from rent, and this right she may enjoy, either personally or by tenants under her, because the possession of her tenants is her possession. But this right of dower cannot, by alienation, be vested in a third person. If the widow marry before her dower is assigned, her husband is not a freeholder within the meaning of our statutes, (Weaver & Gaines v. Crenshaw, 6 Ala. 873,) and the reason given is, that until her dower is assigned, she has no estate. Her right is one which must be enjoyed by her; her possession must be continued either in herself or in her tenants. She may make a lease, but she cannot, by alienation, absolutely part with her right to

the possession, and thereby invest another with it.—Jackson v. Vanderlyden, 17 Johns. R. 168; Jackson v. Aspill, 20 ib. 413.

The cases of Inge v. Murphy, (14 Ala. 289) and Shelton v. Carrol, (16 Ala. 148) and the cases there cited, do not militate against this view. It will be seen on examination, that none of the cases there referred to are like this case. They are all cases where the widow was in the enjoyment of the premises, either by herself or tenants under her; and it may be safely said that no case can be found, even in those States who have statutes similar to our own, where it has been held that a widow, before her dower has been assigned, can sell and convey her mere right of dower, and thereby vest a title in the purchaser, by virtue of which he can maintain an action of ejectment, or defeat one brought against him by the heirs at law. The strongest case referred to is the one in 2 Mo. 163. There the widow leased the premises, and it was held that her tenant being ousted by a purchaser under an execution against the estate of her deceased husband, she might recover the possession by an action of ejectment. In this case, there was no alienation of the mere right of dower, but simply an enjoyment of the right of possession by means of a tenant.

DARGAN, C. J.—The plaintiffs in the court below claimed title to the land in controversy as the heirs at law of Glover Hall, deceased, and the defendant claimed to have acquired the title by virtue of a sale directed to be made by a decree of the Orphans' Court of Shelby, which was rendered upon the petition of John Singleton, the administrator of the decedent, Hall. The only question, therefore, in reference to the titles, is, whether the proceedings of the Orphans' Court, and the sale under them, divested the title of the plaintiffs as heirs at law. The petition of the administrator sets forth that the personal estate of the intestate was insufficient to pay his debts, and therefore prayed that the land be sold for that purpose. In his petition he gave a description of the land and set forth the heirs at law, who were then infants. The court directed notice to the heirs, appointed guardians *ad litem* for them, and on the 17th day of January, 1834, proof having been taken as in chancery causes, a decree was rendered, ordering the land to be sold in pursuance of the statute in such cases made and provided, and by the de-

cree, Henry Robertson, William Thweate, and George B. Nashe, were appointed commissioners to sell the same to the highest bidder, for cash, and to make report to the said Orphans' Court at a term to be holden on the first Monday in March next thereafter. At the July term of said court the commissioners reported that they sold the land on the first day of March, 1834, to John Singleton, for the sum of three hundred and fifty dollars. This report was ordered to be received and recorded, but no further decree was rendered, nor were the commissioners directed to convey the land to the purchaser. They however did, on the 16th of October, 1834, execute to him a deed, purporting to be by virtue of the power in them vested by the decree of the Orphans' Court.

This is a brief statement of the defendant's title, and the only question raised on this point of the case is whether the commissioners had authority to execute the deed? That the court had jurisdiction under the act of 1822 to order a sale of the land for the reason set forth in the petition, is clear; but this act contemplates that the final decree shall be rendered, and the commissioners empowered to make titles, after their report of the sale has been returned to the court. The language of this portion of the act is, "The said court shall, upon coming in of the commissioners' report, render a final decree in the cause, and if the terms of the sale have been complied with by the purchaser of the estate, the commissioners shall be directed by such final decree to convey the estate sold, to the purchaser."—Clay's Dig. 225, § 21. We consider it as a question settled by the decisions of this court, that when the sale is ordered under this act the decree directing the sale is interlocutory, and does not give the commissioners appointed to make the sale the power to execute a deed to the purchaser. Before they can exercise this power they must make report to the Orphans' Court, upon which a confirmatory decree may be rendered, and the commissioners thereby authorized to execute the deed. But, until this is done, until a decree is rendered ordering a conveyance or deed to be executed, the commissioners have no authority to execute one, and their deed without authority does not divest the title of the heirs at law.—Lightfoot v. The Heirs of Lewis, 1 Ala. 475; Cummings *et al.* v. McCullough, Adm'r., 5 ib. 324, 337; Perkins v. Winter, 7 ib. 864. As it is necessary that the final de-

cree should direct the commissioners to execute a deed to the purchaser in order to divest the title of the heirs, it is manifest that the deed shown to have been executed by the commissioners in this case does not have that effect, for it cannot be pretended that there was a final decree directing a conveyance to be made. At law, therefore, the title still remains in the plaintiffs, and they must recover in an action in which the legal title alone can be considered.

2. The defendant also showed a deed for the same land executed by Beverly Blaxton and Emily, his wife; and it appeared that Emily Blaxton was the wife of Glover Hall at the time of his death, and was entitled, as his widow, to dower in the land in question, but her dower had never been assigned or allotted to her by metes and bounds. After the death of Glover Hall, she and her children resided on the land, and upon her intermarriage with Blaxton, they both joined in a conveyance of the whole land, purporting to convey all their interest therein for the sum of one hundred dollars. The question raised upon this evidence is, whether a widow who is entitled to dower in the lands of her deceased husband can sell the same under our statutes, and by her deed enable her alienee to defeat an ejectment brought by the heirs at law, her dower not having been assigned or allotted to her. Under our law a widow is entitled to retain the dwelling house in which her husband most usually dwelt next before his death, together with the out houses and plantation thereunto belonging, free from molestation, or rent, until her dower is assigned her, (Clay's Dig. 173,) and we have held that she may occupy the premises, either in person or by her tenants, until her dower is allotted to her, (Inge v. Murphy, 14 Ala. 289,) and notwithstanding her second marriage, she and her husband cannot be ejected by the heir until her dower is assigned.—Shelton v. Carroll *et al.* 16 Ala. 146. I do not intend to controvert the propriety of these decisions. I think they are in accordance with a fair and just exposition of the statute, which intended to give to the widow the means of support until her dower was allotted to her. It was on this ground that we held, in the case of Inge v. Murphy, that she could occupy either in person or by her tenant, and it was said in that case "that it might be that she could only derive a support from the premises by renting them, and to hold that her removal from the premises would de-

feat her right, might in many instances defeat the very object of the statute, which is a provision for the wife until her dower is allotted to her." I also think it clear that the marriage of the widow does not work a forfeiture of this statutory right. We so held in the case of Shelton v. Carroll *et al.*, but we think these decisions carry the right of the widow as far as it can legally go, and we are not disposed to press it further.

At the last term, in the case of Cook *et al.* v. Matilda Webb, we held that the widow had not such an estate in the lands of her deceased husband as was the subject of levy and sale under execution at law, before her dower was assigned her; that the right given her by our statute until dower was assigned, was personal to herself, a mere privilege to occupy the premises, and receive the profits for her support and maintenance. Now I think it clear that if she has no such estate as can be sold under execution at law, she has none that she can alienate by deed, so as to enable her alienee to defeat an ejectment by the heir at law. If she had any fixed or determinate interest or title that she could sell to another, I could see no reason why that interest could not be sold by her creditors under execution. But as it is settled that she has no such interest or estate in the premises as can be sold under execution, this is conclusive to my mind that she has no such interest or estate as she can alienate to another. If a widow, before her dower is allotted to her, sell her right or privilege to another, the heir at law may bring ejectment against her vendee and recover. The court correctly expounded the law to the jury, and the judgment must be affirmed.

CUTHBERT *vs.* WOLFE.

1. No particular language or form is necessary to create a separate estate in a married woman, either by deed or will, but the intention of the donor or testator must clearly appear.
2. A conveyance of personal property to a trustee "to and for the only use and benefit" of a married woman creates in her a separate estate.

3. When an assignment is written on the back of a deed to which it refers in express language, and conveys the same property, the deed may be looked to in construing the assignment.
4. Husband and wife conveyed certain personal property to a trustee, in trust for themselves during their joint lives, and then for the survivor of them during his or her life, after the death of the survivor for L. during his life, and then for his next of kin. The husband afterwards conveyed his entire interest in the property to L., who afterwards conveyed his entire interest to the trustee, "to and for the only use and benefit" of the wife.—*Held*,
That the husband had no such interest in the property, as could be sold under execution against him.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

An execution was issued from the County Court of Mobile county, in favor of A. Wolfe, against A. F. Edwards, which was levied by the sheriff on a negro man named Jerry, as the property of the defendant. A claim was interposed by Cuthbert, as trustee for Mrs. Edwards, and bond given to try the right of property, as provided by the statute. The written instruments which constituted the claimant's title are sufficiently described in the opinion. The court held that the defendant in execution had such an interest in the property as could be sold under execution against him, and verdict and judgment were rendered accordingly.

Jno. T. Taylor, for plaintiff in error:

1. No particular form of words is necessary to create a separate estate. If the intention of the grantor is clearly expressed, it will be sufficient without regard to the words used.—Newman et al. v. Newman, 12 Ala. 29; Hill on Trustees, 420. The words "sole use" according to many authorities are sufficient of themselves.—16 Pick. 327-331; Agee v. Agee, 6 Mumf. ib. 581; 6 S. & R. ib. 466; 19 Ves. ib. 416; 1 S. & M. ch. 647. And I contend that the words, "only use," as clearly show the grantor's intention as the words "sole use," and that the words alone in this deed are sufficient. But when we see from the record, that Mrs. Edwards was at the time of the gift a married woman; that Mr. Edwards had just before yielded up to Lucas all his claim, and that a trustee was selected, and the legal title

conveyed to him, the object and intention to create a separate estate is placed beyond doubt.—See the opinion in case 16 Pick. 327. The words "own use" have been held in one or two instances not to be sufficient, because those words are commonly used in all deeds, to-wit: "to his own use, benefit and behoof forever;" but the words "only use" are a very unusual expression, and must have been intended to have some meaning, and we can give it no other but to exclude the husband.

2. The deed from Lucas to plaintiff is two-fold; it first conveys all the title he has; it conveys secondly, all such title as he obtained from Edwards, and a title was proven to be in him superior to, and independent of his conveyance from Edwards, and he was not estopped from setting it up. The title from Edwards, and the deeds attached to the bill of exceptions, were only introduced to identify the property, and show title in claimant, not in Lucas.—See Coke Lit. 47, B. 352, A. 363, b.; Com. Dig. Estoppel A. 2 p. 199; 15 Mass. 495; 16 Mass. 357; Shep. Touchstone, p. 53; 6 S. & R. 559; 14 Pick. 467.

Wm. G. Jones, *contra:*

1. The first deed in point of time is that from A. F. Edwards (the defendant in execution) to Cuthbert. By that deed, the slaves mentioned in it are conveyed to Cuthbert as trustee; 1st, for the use of Edwards and wife, jointly during their joint lives; 2nd, after the death of either, for the use of the survivor for life; 3rd, after the death of such survivor, for the use of Jno. H. Lucas for life; 4th, after the death of J. H. Lucas, for his next of kin. It is too clear to admit of controversy or doubt, that by this deed, no separate estate is created in Mrs. Edwards, and the slaves remained subject to levy under executions against A. F. Edwards.—Harkins et al. v. Coalter et al. 2 Por. 463; Lamb v. Wrigg & Stewart, 8 Por. 73; Carlton & Co. v. Banks, 7 Ala. R. 32; Oneal, Mecham & Thomas, v. Teague & Teague, 8 Ala. R. 345-352; Moss v. McCall, 12 Ala. 630; Pollard et al. v. Merrill & Eximer, 15 Ala. 169; Bender v. Reynolds, 12 Ala. 446.

2. The deed from Lucas to Cuthbert being written on the back of the deed from Edwards to Cuthbert, and expressly referring to it, must be taken in connection with that first deed, and considered as confirming it. This should especially be its

effect, as Lucas was a *cestui que trust* under the deed from Edwards to Cuthbert, and by his deed conveys to Cuthbert such interest as he held under the deed from Edwards.—Walker v. Driver, 7 Ala. R. 679.

3. It is therefore submitted, that the deed from Lucas cannot be considered as a separate and distinct instrument. It must be taken in connection with the deed from Edwards, on which it is written, and to which it refers.

4. But even if the court should decide that the deed from Lucas is to be considered as a separate and distinct deed, it does not convey a separate estate to Mrs. Edwards. The courts lean strongly against construing an instrument so as to create a separate estate. The words must be very explicit, and the intent very clear to give it that effect. The words in this case are not sufficient to do it.—See Pollard et al. v. Merrill & Eximer, 15 Ala. R. 169, and cases there cited.—Hale et al. v. Stone, 14 Ala. R. 803.—See especially Haig v. Haig's Ex'rs. 1 Dess. R. 348, where the word "only" use was held not to create a separate estate.

PARSONS, J.—It is agreed by the counsel, that the negro Jerry is to be considered as included in the instruments presently to be mentioned, he having been omitted in making out the transcript by mistake.

A. F. Edwards, by a deed dated June 27th, 1838, conveyed Jerry and other slaves to Cuthbert in trust for said Edwards and his wife, during their natural lives; and after the death of either, in trust for the survivor, during his or her natural life; and afterwards in trust for John H. Lucas, the son of Mrs. Edwards by a former marriage, during his natural life; and afterwards in trust for his next of kin, with some further provisions which are not now material.

The next instrument is a paper dated March 27th, 1839, written on the back of the deed, of the 27th June, 1838, and signed by A. F. Edwards, by which he relinquished all his right, title and interest in the negroes mentioned in the deed to Lucas. And the next and last is an assignment by Lucas, of date 20th January, 1843, which was also written on the back of the deed, by which he assigned and released to Cuthbert, the trustee in the deed, "to and for the only use and benefit" of Mrs. Ed-

wards, all his right, title and interest in and to all the property specified in the deed. The Circuit Court charged that this assignment did not create a separate estate to Mrs. Edwards, but that it made the property liable for her husband's debts. This charge is assigned as error. The question is, does it clearly appear that the intention was to create a separate estate, free from the husband's control? It results from the cases generally, that no particular language or form is necessary in an instrument, whether it be a will or a deed, to create a separate estate to a married woman, though it must clearly appear to have been the intention of the testator or donor to do so. Mrs. Edwards was at the time of the assignment a married woman; the assignment conveyed the property to and for her only use and benefit. The language would not have excluded the husband more effectually, if it had been "to her sole use and benefit." If the latter had been the language, the husband would have been excluded according to various authorities.—Ayer v. Ayer, 16 Pick. 327; Anderson v. Brooks, 11 Ala. R. 953, and other cases cited by the counsel of the plaintiff in error.

But the two latter instruments were written on the deed, and had express reference to it, which authorizes us to look to it as a means of construing the assignment.—Rives, Adm'r. v. Toulman, decided at last term.—Walker v. Driver, 7 Ala. R. 679.

By the deed, Edwards conveyed the property to the trustee upon several successive trusts; first in trust for himself and wife during their joint lives, afterwards in trust for the survivor during his or her life, and afterwards in trust for Lucas, during his life, and then in trust for his next of kin. Edwards after this conveyed his entire interest in the trust property to Lucas, and the latter afterwards conveyed his entire interest, as well what Edwards conveyed to him as what he otherwise held in the trust property, to the trustee, "to and for the only use and benefit" of Mrs. Edwards. Looking at the three instruments as one, or considering them as separate and distinct, it is equally clear that Edwards has no interest in the property. What he had he conveyed to Lucas, and then Lucas conveyed it back to the trustee, to and for the only use and benefit of Mrs. Edwards. Considering all the instruments, we cannot doubt but that it was the intention of Lucas to exclude Edwards. There is no question of fraud before us.

The judgment is reversed, and the cause remanded.

HALL *et als.* *vs.* DOE *ex dem.* ROOT.

1. A party whose title to land situated within the territory of Louisiana was complete by grant from the Crown of Spain while that power held dominion over the country, may successfully assert his title against any claimant under the United States Government, if the grant has not been rendered inoperative as an instrument of evidence by his failure to exhibit it for registration as required by the act of Congress
2. In respect to incomplete titles, if a claim was such as would have bound the conscience of the former sovereign to perfect the title, and furnish the evidence necessary to support and maintain it, the United States Government having acquired the territory would take it charged with the duty of carrying out in good faith the obligation of the previous Government existing at the time of the cession.
3. But when an incomplete title is perfected either by act of Congress or by patent, the United States, and not the previous Government, must be regarded as the source of title.
4. When a party claiming land in the ceded territory is obliged to appeal to the political power of the United States Government in order to perfect his title, or to obtain the evidence of title, that Government has a right to prescribe the terms or conditions upon which such confirmation or recognition will be made; provided those terms or conditions are not inconsistent with the performance of the duties and the faithful discharge of the obligations imposed upon it by the transfer of the ceded territory.
5. When two claims to the same land are confirmed by the United States Government, the parties are remitted to their rights derived from the former Government, the effect of the confirmation being to place each party *in equali jure*, so far as the action of the Government is concerned.
6. A title to land situate within the territory of Louisiana, derived from the Spanish Government, the written evidence of which was never presented to the United States Commissioners, nor recorded under any of the different acts of Congress, cannot be received in evidence against any grant derived from the United States.
7. But the unrecorded evidence of such title, and the mesne conveyances connecting the defendant therewith, would be admissible to show an adverse possession under color of title, so as to protect the party in possession under the statute of limitations.
8. A claim founded on an alleged Spanish grant, (the written evidence of which grant has been lost by time or accident,) which has never been confirmed by act of Congress, cannot defeat an action of ejectment,

by one whose claim, founded on a Spanish concession, was presented to the United States Commissioner, reported for confirmation by him, confirmed by the act of Congress of 1822, located and surveyed under the warrant of the Register and Receiver, and consummated by patent from the United States.

9. A claim to land within the Territory of Louisiana, which the Commissioner reports to Congress as having been formerly inhabited and cultivated, but does not say that such inhabitation and cultivation was under the Spanish Government, cannot be considered as having been recommended by him for confirmation.

10. A plaintiff shows a sufficient title to maintain an action of ejectment, by showing that the original claim upon which his title is founded was presented to the United States Commissioner, reported by him for confirmation, confirmed by the act of Congress of 1822, located and surveyed under the warrant of the Register and Receiver, and consummated by patent from the United States Government.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

JOHN T. TAYLOR, for plaintiffs in error:

The act of 1822 confers no title on the defendant in error, or those under whom he holds; it is nothing more than a relinquishment of any claim on the part of the government, and both parties in this case must depend upon their rights, independent of the confirmations.—Eslava v. Farmer's Heirs, 7 Ala. 553; S. C. 11 ib. 1028; 2 How. U. S. R. 285; 3 Ala. 47.

The confirmation and patent can only be made available when offered in evidence against one holding under the United States by subsequent grant.—See the wording of the confirmation, 1 Land L. 832, § 2, and the authorities above cited.

The plaintiff below should therefore have shown a good title in himself independent of the confirmation, and in this he entirely failed, 1. Because the permit and occupation, if proved, show no rights whatever that our courts will recognize; 2. Because no permit or any evidence of title from the Spanish Government was proved, (the mere copy of, or what purports to be a copy of a permit made out by the plaintiff himself, and attached to his claim presented to the commissioner, is no proof of the document,) nor was the evidence taken before the commissioner any proof; 3. Because the Spanish law required that all persons

holding permits and other imperfect claims must apply to the Governor to have their lands located and final titles made within a certain time, or their claim should be forfeited.—2 White Rec. 240, Art. 22. The Spanish Government never regarded a permit as any title whatever.—2 ib. 239, Art. 18. Cornelius Dunn never complied with this law, and his claim forfeited and reverted to the Government; 4. Because when John Linder, then living on his Lusser tract, had it surveyed early in 1800 by the authorized Spanish surveyor, in obedience to the law before referred to, and it was ascertained that it covered Dunn's settlement, he acknowledged the superiority of Linder's titles, surrendered to him the possession, and left.—Bossier v. Marlin, 5 Martin (new series) 33, and ib. (old series) 678. If, therefore, the defendant below had shewed no title at all, the plaintiff ought to have failed, as was the judgment of this court in the case of Farmer's Heirs v. Eslava, (11 Ala. 1028.) But the defendant did show a most complete title, the evidence of which was—1. Title from Bienville and Solmon, governors and ordinators, to Madam De Lusser, in the year 1738, and from her in a regular chain of conveyances to Hall. This title, it is seen, is more than an hundred years old, and possession has accompanied the title during the whole of that time, and John Hall is now in possession. This is sufficient to prove that the title and possession have never been separated and would seem to make our title complete.—See Farmer's Heirs v. Eslava, 11 Ala. 1028. But the plaintiff below contends, that it is void because it was never presented to the Land Commissioner, according to the act of Congress of 1812. In reply to this, we say the claim was filed and recorded in Spanish archives, together with the plat and survey, before the treaty of 1800 or 1803, and was regularly transferred to our records. The claim was also presented by Daniel Johnson to the Land Commissioner at St. Stephens. Whether it was afterwards recorded, or recommended, or confirmed, was a matter for the officers of the Government. The title could derive no aid from any action of the Government, and none consequently was asked. This would be a sufficient compliance under the act, if it was necessary to insist upon it; but I contend that this being a complete grant, separate from the general domain, and recognised as private property by all the preceding governments under which it passed, it stands en-

tirely independent of any action on the part of the Government of the United States, and was perfectly good without any presentation at all.—Levorgne v. Elkins, 17 Louisiana, 220; Treaty of Paris, Land Laws, 1 vol. 519, Art. 3; 4 Louisiana, 272; 7 Ala. 882; Strother v. Lucas, 6 Pet. 772; 1 White's Rec. 714–15–16; 7 Pet. 90–3, 88; 12 ib. 744; 14 ib. 396, 421; 7 Ala. 557; 2 Pet. 310–14–15. And besides, this act (and none of its predecessors on the subject) does not propose to make the titles entirely void, but only that they shall not be read in evidence against any one holding under the United States. Now the plaintiff below holds not under the United States, but under the Spanish Government.

But even if our title was defective, it was nevertheless good against the plaintiff, as an outstanding title, unless the statute of limitations affected it, and that was a matter entirely for the jury. The judge's charges can in no particular be aided by what might be supposed to be the effect of the act of limitations, for the jury alone must determine upon that.—Farmer's Heirs v. Eslava, 11 Ala. 1028. I conclude, therefore, that the title of Mr. Hall was the best, or at least should have been fairly left to the jury, under the questions of fact arising under the titles.

But suppose the court should be of the opinion that the title of the plaintiff below was the best, then the question arises, how much and what land does his title call for, and I insist that it does not extend North of Potatoe Bayou. The act of 1822 does nothing more than confirm the title. We therefore have to go back to the original permit, to ascertain how and where to locate it, and from an inspection of that instrument nothing is clearer than that the whole claim was permitted, on the Eastern shore of the Tensaw, South of the Bayou, or on the "South bank of the Bayou, extending three miles in ascending it," (the Bayou.) There is not a particle of evidence that Dunn even ever asked the Spanish Government for one foot of land North of the Bayou, but all on the South bank. The owners of the De Lusser title were then in possession of the land above, and had been for nearly seventy years. If he had asked for a permit above the creek he could not have got it, because he could never have proven that it was vacant, as was then required. But he never, in his life time, claimed above; his settlement and improvements were all below, according to his permit. Not one of

his cattle was ever known to be above the Bayou, because he knew his "Cow Range," accrued from the Spaniards, did not extend above it; and I further contend that no claim has ever been presented to the Land Commissioner for one foot of land North of the Bayou, nor has any recommendation or confirmation ever been passed, touching any claim North of the Bayou. The claim filed by Thomas Dunn, in 1813, calls for land on the "South bank of the Bayou," and the claim filed by Byrne in 1820, calls for land South of the Bayou. The survey and patent therefore are contrary to the claim and confirmation, and are void as to land North of the Bayou, and there was no use of going into equity to set it aside.—Pollard's Heirs v. Files, 3 Ala. 47; Mayor & Aldermen v. Farris' Heirs, 6 ib. 738; Stoddard v. Chambers, 2 How. U. S. R. 285; Baldwin v. Stafford, 10 Martin, 364.

PHILLIPS, *contra:*

The title of the plaintiff consists in the Spanish concession, report of commissioners, confirmation by act of Congress, the survey made under the act, and the patent issued in conformity with the survey.

This title on paper is complete, unless the objection of the defendant, and the only one he has offered, can be made good, to wit: that by the true construction of the Spanish permit, no land was granted North of the Potatoe Bayou, and that the patent is therefore void for so much at least as covers this portion of the land.

The defendant having called upon the court to give to the jury the true construction of this document, the court considered the most reasonable construction to be the one adopted by the government.

We think this construction to be the true one, but whether true or false, is wholly immaterial. It may be admitted that the Spanish permit, though made in 1796, at a period when Spain was doubtless the true owner of the land, did not sever the land from the royal domain. The legal title still remained in Spain, until by formal transfer, it passed to the grantee. If Spain had continued its dominion over the country, it would have construed its own grant in directing and approving the survey; and the courts would not have been permitted to defeat a title founded

on a governmental survey, in a collateral proceeding, upon the ground that an erroneous construction had been given by the government to its own incipient grant.

The change of government has had no other effect than to impose upon us the obligations and the rights which existed before the change, and the same rule will govern this court. If a fraud were practised upon the government, or a mistake committed by it, the government could be relieved by a direct proceeding in the nature of a *scire facias*, but a third party cannot set up these matters in a collateral issue.

The plaintiff has therefore exhibited a complete title, originating with the Spanish Government and perfected by our own, and must recover, unless defendant can show that he has a superior title, derived from the same sources.

The defendant's title is shown by his application to the board established by this government. John Linder applies in August, 1814, as the agent of Daniel Johnson, for 5000 acres, by virtue of a grant lost by time or accident, given by the Spanish Government in favor of John Linder the elder, and by him devised to his grand son, John Linder, from whom Johnson purchased by deed, in 1803.

The report of the commissioner, made in 1816, recommended that the claim should be confirmed for a "reasonable quantity." 3 S. P. § 10, 6, 31. What this reasonable quantity consists of, has never been ascertained.

The act of Congress of 1819, provides that when there has been no survey, or no survey recorded, the claim shall be confirmed for twelve hundred and eighty acres as a donation. (Land Laws, 759,) and this act requires these claims to be surveyed. This also is the requisition of the act of 1822.

The claim of the defendant is, therefore, imperfect, both as to its location and title.—Farmer's Heirs, 11 Ala. 1042.

If defendant insist that his title was confirmed as it originally existed, what title would be referred to? Clearly to the grant of the "Spanish Government to John Linder the elder." But upon the trial there was no attempt to show that such a grant had ever existed. The only attempt made was to show a Spanish grant to an entirely different person. To prove his title, then, independently of the action of this government, defendant offered the papers in reference to the DeLusser title, for the

purpose of showing title to himself claiming under them. But these documents having never been presented to the Board of Commissioners, were properly rejected as title papers.—Land Laws, 607; Henderson v. Poindexter, 12 Wheat. 543; De LaCroix v. Chamberlain, ib. 599; 6 Pet. 771; Strother v. Lucas, 12 Pet. 448; Barry v. Gamble, 3 How. 32; Hallett v. Eslava, 3 S. & P. 120.

The defendant's claim has never been confirmed at all. The act of 1819 operates upon the report of 1816, and this report recommended for confirmation such claims only as "were inhabited and cultivated under the Spanish Government," and this for a "reasonable quantity."

There is no evidence furnished in the report of this essential requisite to the confirmation, and the act only confirms such as the commissioner recommends for confirmation. The evidence of the abstract shows that it was "inhabited and cultivated," but does not show that it was in "Spanish times," and this is accompanied with the observation of the commissioner that the bill of sale which was presented as the foundation of this claim was "altered."

But not only is there an entire absence of proof in the report of the commissioner as to this matter, but there is the same deficiency in the certified copy of the proceedings from the land office. No proof was ever made to the commissioner to show that the inhabitation and cultivation was in Spanish times, as was done, with but one or two exceptions, in the sixty-seven claims included in this class. In all the other cases the period of occupation is expressly stated, and when the commissioner makes his report, he therefore distinguishes those exceptions from the other claims, not by their specific numbers, but by the fact of "inhabitation or cultivation under the Spanish Government," recommending that those only should be confirmed. The recommendation, therefore, does not include cases of inhabitation and cultivation under the British, French or American Government, but is confined to the Spanish Government alone. No further presentment of this claim was ever made, and consequently it is only to be found in the report of 1816.

In compliance with the provisions of the act of 1819, the report of 1820 was made, which is acted upon by the act of 1822. It is insisted that the act of 1822 does not operate upon the

claims contained in the report of 1816, except such claims as may be found again presented in the report of 1820. And it is further insisted that the defendant's claim is not confirmed by the report of 1816, and act of 1819. But if it were so confirmed, it could only be for 1280 acres, and not for 5000, as set up by the defendant. The defendant, therefore, under the most favorable view, had no such right as could have barred the recovery.

The patent was properly issued to Thomas Byrne, although he was but the representative of the heir of Dunn. If Byrne had insisted upon holding the title from the heirs, it would have given them a right to the protection of the court of equity, but the patent properly issues to the claimant.—Strother v. Lucas, 6 Pet. 763; S. C. 12 ib. 458; Stoddard v. Chambers, 2 How. 316.

CHILTON, J.—This was an action of ejectment brought by the defendant in error against the plaintiffs in error, to recover a certain tract of land situate in the county of Baldwin, the venue having been changed to the Circuit Court of Mobile.

The questions for revision in this court arise solely out of a bill of exceptions which was sealed by the presiding judge upon the trial in the court below. The titles under which the parties respectively claim the land are set out, and the defendants below asked the court for several instructions to the jury, which were refused, and to which refusal they excepted, as also to several charges which the court gave, involving the relative merits of the titles.

Before proceeding more particularly to notice the several charges refused and those given, it will conduce to a better comprehension of the case and greater perspicuity in its decision, briefly to state some principles applicable to it, which may be drawn from the decisions of our own, and the courts of the United States, as also to collate the several statutes passed by Congress, upon the construction of which the titles are made to depend.

And first, we may remark, that had the title of either party been complete by grant from the crown of Spain, while the territory belonged to that country, then the party having such complete title could have asserted it and made it available to defeat

any claim of title derived from the United States; for in such case, the land before the cession by the treaty of Ildefonso to France, and by France to this government by the treaty of Paris, had become private property, and a cession of territory is not a cession of the property belonging to its inhabitants. "The king cedes that only which belonged to him. Lands which he had previously granted were not his to cede."—Per Chief J. Marshall, United States v. Pecheman, 7 Pet. 87; Doe v. Eslava *et al.*, 9 How. 445. As to the effect of a failure to exhibit such grants for registration, we will speak hereafter.

In respect to incomplete titles, it may be safely asserted as a correct proposition, that if the claim was such as to have bound the conscience of the former sovereign to perfect the title, and to furnish the evidence necessary to support and maintain it, this government, having acquired the territory, would take it charged with the duty to carry out in good faith the obligation of the previous government existing at the time of the cession. In such case, the former government, never having parted with the title, it would devolve upon this government, but charged with the duty, on the part of the United States, of conferring it upon the person justly entitled. When perfected either by act of Congress, or the usual evidence of a grant, a patent, this, and not the previous government, must be regarded as the source of title.

In the next place, we think it very clear that in cases where the parties claiming land in the ceded territory must, in order to perfect their titles, or to obtain the evidence of title, appeal to the political power of the government of the United States, that government has the right to prescribe the terms or conditions upon which such confirmation or recognition will be made by it, provided those terms or conditions are not inconsistent with the performance of the duties and the faithful discharge of the obligations imposed upon it by the transfer of the ceded country to it.

In order to ascertain what these obligations were, and to enable this government in good faith to meet and discharge them, and further, to enable it to proceed and make sale of the public land without the hazard of invading the private rights of those claiming under the former governments, by an indiscriminate sale of the whole territory, it was necessary that steps should

be taken to ascertain who laid claim to these lands, and the portions so claimed. It was also necessary to determine the character of the claims so that it might be seen whether it was incumbent on this government to recognize or affirm them. To ascertain these titles and claims, the act of 1812 was passed, authorizing the appointment of commissioners and prescribing their duties.—Laws of the United States by Story, p. 1235.

By the third section of this act, the commissioners were required, after having attended a reasonable time in the respective parishes, to establish offices in such districts respectively at some convenient point, of which they were to give public notice, and claimants were allowed to deliver the notices and evidences of their claims within six months after the offices were established, and the claims should be placed in the same condition as if said evidences, &c., had been delivered while the commissioner was in the parish making his investigation.

The fourth section provides "That every person claiming lands in the tract of country aforesaid, by virtue of any grant, order of survey, or other evidence of claim whatsoever, derived from the French, British or Spanish governments, shall deliver to the commissioner for land claims, when attending for the purpose in the parish where the land claimed may lie, a notice in writing, stating the nature and extent of his claims, together with a plat (in case a survey shall have been made) of the tract or tracts claimed; and shall deliver to the commissioner when attending as aforesaid, for the purpose of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim, and the same shall be recorded by the clerk in books to be kept for that purpose, on his receiving from the party or parties, at the rate of twelve and a half cents for every hundred words contained in such written evidence of their claim; provided, however, that where lands are claimed by virtue of a complete French, British, or Spanish grant, it shall not be necessary for the claimant to have any other evidence of his claim entered at large upon the record, than the original grant or patent, together with the order of survey and the plat; all of the other conveyances or deeds may be abbreviated in the entry; but the claim of title and the date of every transfer shall appear on the record; and if such person shall neglect to deliver such notice in writing of his claim, together with the plat, (in case

the lands claimed shall have been surveyed) as aforesaid, or cause to be recorded such written evidence of the same within the time and times aforesaid, his claim shall never after be recognized or confirmed by the United States; nor shall any grant, order of survey, deed, conveyance or other written evidence, which shall not be recorded as above directed, ever after be considered or admitted as evidence in any court of the United States, against any grant which may hereafter be derived from the United States."

The fifth section empowers the commissioners to enquire into the justice and validity of the claims filed before them, the evidence relating to which is required to be recorded. By this section, it was made the duty of the commissioners to ascertain, 1st, whether the lands claimed have been inhabited and cultivated; 2d, at what time such inhabitation and cultivation commenced; 3d, when, by whom, and under what authority, such land was surveyed; and they were further required to examine into every other matter affecting the justice and validity thereof, and were invested with the power of compelling the attendance of witnesses, and of administering oaths, &c.

The seventh section requires the commissioners to prepare abstracts from the records of the claims filed, which shall contain the substance of the evidence adduced in support of them, with such information and remarks as may be necessary to a proper decision thereon, which abstracts were to be reported to the Secretary of the Treasury, and by him to be laid before Congress at the next session thereafter, for their determination thereon.

The eighth section requires the commissioners to collect and report to Congress a list of the actual settlers on the land, who have no claims to land derived under either the French, British, or Spanish governments, and the time when such settlements were made. These are the important provisions of the act of 1812. The act of 18th April, 1814, extended the time for delivering notices, and the evidences of claims, until the 1st September, 1814. Under the provisions of these acts, commissioners were appointed, who proceeded to make the required investigations, and to report to the Secretary of the Treasury, which reports were submitted to Congress.—See 3 vol. of the American State Papers, p. 6, *et seq.* These reports, though submit-

ted to Congress on the 2nd of January, 1816, do not appear to have been finally acted upon until the 3rd of March, 1819.

In the report made by William Crawford, who was the commissioner charged with the investigation of claims to land East of Pearl river, he designates the claims presented under appropriate heads, classifying them in twelve lists or registers, according to the nature of the claims, and the action had upon them.

One of these contained a register of claims founded on private conveyances, which had passed through the office of the commandant, but founded, as the claimants supposed, on grants lost by time or accident. This register comprised sixty-seven claims for different quantities of land, and the opinion of the said commissioner which accompanied the report was, that although the grants upon which these claims were founded were lost, yet he conceived that the claims to such lands, not exceeding a reasonable quantity, as were inhabited and cultivated under the Spanish government, ought to be confirmed.

By the second section of the act of 1819, all claims reported as aforesaid in the several reports of the commissioners, founded on any order of survey, *requette*, permission to settle, or any written evidence of claim, derived from the Spanish authorities, which ought in the opinion of the commissioners to be confirmed, and which by the said reports appear to have been derived from the Spanish governments before the 20th day of December, 1803, and the land claimed to have been cultivated and inhabited on or before that day, shall be confirmed in the same manner as if the title had been completed; provided, that in all such claims where the plat and certificate of survey made prior to the 15th April, 1813, under the authority of the Spanish government, in pursuance of such claim, has not been filed with such commissioners, such claim shall not be confirmed to any one person for more than twelve hundred and eighty acres; and that for all other claims to land comprised in the reports aforesaid, and which ought in the opinion of the commissioner to be confirmed, the claimant to such land shall be entitled to a grant therefor, as a donation. This grant, however, was not to be made to any one person for more than 1280 acres, and these confirmations and grants were to operate only as a relinquishment by the government forever, on the part of the United States, of any claim whatever to the tract of land so confirmed or granted.

One of the alleged titles set up by the plaintiffs in error in the Circuit Court, was reported upon by the commissioner in the report made in 1816, and the same is embraced in the register of claims, founded on private conveyances which have passed through the office of the commandant above referred to. The claim is thus stated in the report, "number of claim, 51; by whom claimed, Daniel Johnson; original claimant, John Lynder; where situated, Mobile Bay; quantity claimed, 5,000 arpens; cultivation and inhabitation, formerly inhabited and cultivated by Lynder. The date of the bill of sale to Johnson appears to have been altered."—3 vol. State Papers, 31.

The other claim set up by the said plaintiffs in error, founded on a title derived from the Spanish Government by Mad. De Lusser, and the several mesne conveyances to Mr. Hall, are attempted to be sustained independent of any action on the part of the government of the United States. Neither the alleged grant and certificates of title and possession given by the Spanish authorities to Mad. De Lusser, nor the mesne conveyances, were presented either to the commissioner of land claims, or to the register and receiver of the land office at Jackson court house, (who, under the provisions of the eighth section of the act of 1819, succeeded to the powers and duties previously devolved upon the commissioners,) to be entered of record, as required by the acts previously noticed.

By the seventh section of the act of 1819, persons who had filed notices with the commissioner according to the former laws upon the subject, but who had not exhibited sufficient evidence in support of them, and whose claims had not been confirmed, were allowed to deliver other evidence by the first of July, 1820, which evidence was required to be recorded as under the previous acts.

Under this last act, it appears that Thomas Byrne made known his claim before the register and receiver, acting as land commissioners at Jackson court house, and the same is embraced in their report upon the "register of claims to land in the district east of Pearl river, in Louisiana, founded on orders of survey, (*requetts*) permissions to settle, or other written evidence of claim, derived from either the French, British or Spanish authorities, which in the opinion of the register and receiver ought to be confirmed." The claim is thus stated in the abstract or

register, number 2: "Number of claim, 3; by whom claimed, Thomas Byrne; original claimant, Cornelius Dunn; nature of claim, and from what authority derived, Spanish government; date of claim, 17th September, 1796; quantity claimed, unknown; where situated, Potatoe bayou; by whom issued, Peter Oliver; cultivation and inhabitation, from 1793 to 1804."—3 vol. Am. State Papers, 395. Notice of this claim was first filed before the commissioner Crawford by Thomas Dunn, on the 25th day of June, 1813, but it does not appear that any action was had upon it, under the claim asserted by Thomas, as the son of Cornelius Dunn, who had died. The notice of Byrne claims the land as the son-in-law of Cornelius Dunn, under a permit from Don Pedro Oliver, a Spanish commandant of the town and district of Mobile, "to establish a cow pen upon the southern bank of the bayou, called Potatoe, on the east border of the river Tensas, carrying said cow range at least three miles above said bayou, reckoning to be from its mouth in ascending it." This permit and the evidence in support of it appear to have been duly recorded.

The report of the register and receiver upon the claim of said Thomas Byrne, was confirmed by Congress, by the second section of the act of 1822, "in the same manner as if the title had been complete," such confirmation, however, to amount only to a relinquishment forever of all claim on the part of the United States.—Story's L. U. S. 1868. And by the fourth section of the same act, the said register and receiver were invested with power to direct the manner in which such lands should be located and surveyed, having regard to the laws, usages, and customs of the Spanish government on that subject; and in cases of interfering or conflicting claims, said officers had power to decide between the parties, and were required to be governed in their decision by such conditional lines or boundaries as may have been agreed on, either verbally or in writing, at any time before the passage of the act, between the parties. The same act further provides that, in cases of conflicting or interfering claims, where the parties interested have agreed on no conditional lines or boundaries as to the manner of locating the same, the register and receiver of the district shall make an equal division of the land claimed, so as to allow each party his or their improvements, but this was not to be done in favor of an intru-

der who had made his establishment after having been forbidden to do so.

Under this provision of the act of 1822, the register and receiver proceeded to direct the location of Thomas Byrne's claim, which was surveyed and located accordingly, and a patent issued therefor, embracing the law described in the declaration, upon their certificate of confirmation, and plat of the survey filed in the general land office. This patent purports to be but a quit claim of the United States to Thomas Byrne, in right of Cornelius Dunn, subject to any just claim or claims to all and every part thereof, of all and every person or persons, bodies politic or corporate, derived from the United States, or from either the British, French or Spanish authorities. The deed of Thomas Byrne and wife to the lessor of the plaintiff, Chester Root, was duly proved.

This constitutes a summary of the legislation of Congress upon the subject of these lands, and the action of the officers of the general government, in relation to the titles which are set up in the record before us.

In respect to the title set up, as derived from the Spanish authorities to Mad. De Lusser, and the evidence of that title, and of the mesne conveyances, &c., connecting the plaintiffs in error therewith, we are of opinion, that inasmuch as they were never presented to the board of commissioners as required by the several acts to which we have referred, they were improperly received as evidence, and could not operate to defeat a title derived from the United States. Not having been recorded, as provided for by these acts, they cannot "ever after be considered or admitted as evidence in any court of the United States, against any grant thereafter to be derived from the United States." In Strother v. Lucas, 12 Peters, 410-448, Mr. Justice Baldwin, in speaking of the various acts limiting the time for filing claims before the commissioners, said, "These are laws analogous to acts of limitations, for recording deeds, or giving effect to the award of commissioners for settling claims to land under the laws of the States; the time and manner of their operation, and exceptions to them, depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which calls for their enactment. Reasons of sound policy have led to the general

adoption of laws of both descriptions, and their validity cannot be questioned." It may be said of such claims as these, as was remarked by Chief Justice Marshall in Henderson v. Poindexter's Lessee, 12 Wheat, 543, when speaking of a failure to present a claim as required by the act of 3rd March, 1803, and the supplemental act of March 1804, "claimants," said he, "could not complain, if the law which gave validity to their claims, should also provide a board to examine their fairness, and should make their validity depend on their being laid before that board. The plaintiff in error has failed to bring his case before the tribunal, which the Legislature had provided for its examination, and has therefore not brought himself within the law." In the case before us, however, it is insisted that the certificates or recognition of title by the Spanish and French authorities to Madame De Lusser, gave her a complete title, which needed no confirmation by the United States to give it validity, and that it was not therefore necessary for those claiming under her to present the claim or evidences of title to the land commissioners to be recorded. It will be observed that the language of the act requiring this to be done is general, and embraces all grants either from the British, French or Spanish governments, whether complete or inchoate, providing in cases of complete grants, that the grant itself, together with the order of survey and plat, shall be recorded, and that the mesne conveyances may be abbreviated; "but the claim of title and the date of every transfer shall appear on the record." It is true, the act does not say, as some of the previous acts had said in reference to other portions of the territory acquired by the treaty of Paris, that the right of the person failing to file the evidences of his claim, &c., shall become void, or shall be ever after barred; but as against any grant which may be derived thereafter from the United States, the grant, order of survey and conveyances, which the claimant fails to deliver for the purpose of being recorded, become wholly inoperative, inasmuch as they cannot be considered or admitted as evidence in any court of the United States.

I have seen no case which questions the authority of Congress to pass such statutes as the one above referred to. It was certainly of the last importance to the repose of society, and the security of titles, that such measures should be adopted as would

enable the government of the United States to determine what land was subject to its disposal. It was further, as I conceive, the obvious duty of the government of the United States to require of persons claiming to hold under the governments which previously owned this country, to make known in some appropriate manner the nature and extent of their claims, so that the occupants of the county might have the means of ascertaining who were the proprietors, and of avoiding conflicts, as well as of protecting their improvements and possession against dormant titles.—In Bagnell, et al. v. Broderick, 13 Peter's R. 450, it was said that "Congress has the sole power to declare the dignity and effect of titles emanating from the United States;" and it has virtually declared that its grant shall prevail over a claim of the character of Mad. De Lusser's, the evidence of which has never been delivered to the appropriate offices for record. And we may safely conclude, that, if persons holding grants from the ceding governments chose to withhold from being recorded the evidences of them, and of the mesne conveyances, they elected to submit to the alternative imposed by the act of Congress, and to have them rendered impotent as evidence when opposed by a title derived from the United States.

But it is objected that the title set up by the plaintiff below was not derived from the United States, but that he holds under the Spanish concession to Cornelius Dunn, which Congress has confirmed, and that therefore, the act which declares the unrecorded evidences of grants, conveyances, &c., shall not be admitted or considered, &c., does not apply. We have anticipated this objection by the proposition stated in the outset of this opinion, that in such cases, the government must be regarded as the source of title. The Spanish permit given to Dunn, to establish a cow pen on the Southern bank of Potatoe Bayou on the Eastern border of the river Tensas, carrying said cow range at least three miles above said bayou, reckoning to be from its mouth in ascending it, did not give him a title, but the permission upon its face proposed "that in the mean time he could obtain the corresponding title from the general government, after giving the proper information thereon." This permission was never perfected into a title under the Spanish government, but after the cession to the United States, constituting as it did rather an appeal to the bounty, than a demand upon the justice of

this government, it was confirmed as if the title had been complete; was located and surveyed, and a patent issued for the same. The patent is qualified, it is true, but still it operates to pass the title from the United States to the person to whom it is given, and being thus operative, must be regarded a grant from the government, and the act of Congress which forbids that the evidence of unrecorded grants from the ceding governments shall be admitted or received against it in any court of the United States applies to it.

Had the unrecorded evidence of a grant and mesne conveyances been introduced to show an adverse possession under color of title, so as to protect the party in possession under the statute of limitations, then they would have been properly allowed.—*Doe. ex dem.* Farmer's heirs v. Eslava, 11 Ala. R. 1042; and same case, 9 How. R. *supra.* But such is not the effort in the case before us; the attempt is to make them operative as title papers to defeat the patent from the government of the United States.

The De Lusser claim aside, we proceed to examine the other set up by the defendants below. This was founded, as the claimant alleged, on a Spanish grant lost by time or accident, given to John Linder, sen'r., by him bequeathed to his son, John Linder, jr., and by him sold in 1803, to Daniel Johnson, with whom the tenant in possession connects himself by irrevocable power of attorney.

The first inquiry respecting this claim is, has it ever been confirmed? The report of the commissioner, it will be remembered, which was made upon this and similarly situated claims, recommended for confirmation such of the claims for land as had been inhabited and cultivated under the Spanish government. The report says, this land was formerly inhabited and cultivated by Linder, but when it was so inhabited or cultivated, does not appear either by the report or the evidence taken before the commissioner. We cannot then, without doing violence to the report, consider this one of the claims recommended for confirmation. But if we were to regard it as recommended for confirmation, why then, it is only confirmed "for a reasonable quantity," which the act of confirmation says, shall not exceed 1280 acres, and no location or survey has ever been made in accordance with the statutes above cited. So that in any light in

which we can view this claim, we think we should be wholly unauthorized to give it the effect of defeating the claim of the plaintiff, which, as we have said, is founded on the Spanish concession, presented to the commissioner, reported for confirmation by him, confirmed by the act of 1822, located and surveyed under the warrant of the register and receiver, and consummated by the evidence of the patent from the government.

But it is insisted by the counsel for the plaintiffs in error, that conceding the defendants below showed no title, yet the title shown by the plaintiff was not sufficient to maintain the action; and he makes several objections to it, all of which seek to go behind the confirmation and patent. Now it is true, that where two claims to the same land are both confirmed by the government, as in the case of *Doe ex dem.* heirs of Farmer v. Eslava, *supra*, the parties are remitted to their rights derived from the former government; the effect of the confirmation being to place each party in *equali jure*, so far as the action of the government was concerned. Hence, the effort in that case to show the better title derived under the former government. But such is not the case here. We have shown that the claims set up by the defendants below cannot be required; and the question then comes up, whether the land in controversy belongs to the plaintiff, or to the government of the United States, which must be regarded the owner of the fee, unless it be shown that the same has been divested in some way. What is the effect of a confirmation of these incomplete or inchoate titles?—In Eslava v. Doe, 7 Ala. 543, it is said "that the design of the various acts of Congress, confirming incomplete titles to land in Florida, it would seem, was not to legislate upon the title, but, by the disavowal of title in the United States, to remove all obstacles to the settlement of controversies relating to the title by the judicial tribunals." We do not understand our predecessors, in the opinion from which we have extracted a portion of the first head note, to decide that the confirmation, location and survey, and the patent issued thereon, do not operate to vest the person in whose favor the confirmation was had with a title which will maintain an action against one who can show no title, or that the patent is wholly inoperative to convey a title from the United States, if the United States at the time had any. They say the confirmation amounts to "an admission by the

government, that the land so confirmed is private property, and is not a part of the public domain;" that "it is not, and was not intended to be a guaranty of the validity of the title so confirmed, except as against the government," &c. Now we agree that it was not intended to confer on the confirmee any rights as against other claimants to the land, for these rights are expressly reserved; but as against the United States, there can be no doubt that the title passes, whether by way of estoppel, or by the operation of the confirmation, and the patent issued in accordance therewith as a conveyance, makes no difference; and the government having said by its solemn act, that the land belonged to Thomas Byrne, in right of Cornelius Dunn, it is not for a stranger to say, that the conveyance is informal, or that the government has been imposed on, or that the survey and patent embrace land not covered by the original claim. Much less is it allowable to say that the confirmation should not operate in favor of the confirmee, because of some defect in the mesne conveyances from the original claimant to such confirmee. In the aspect in which we are considering this case, all these are questions between the plaintiff below and the government, and the persons whose rights are supposed to have been affected, which the defendants, being strangers, have no interest in. We say they are strangers, because the claim of Linder not having been confirmed, and failing to show any original grant to him, which can have the effect of severing the *locus in quo* from the public domain, they have no standing in court as against the title exhibited by the plaintiff below.

In Strother v. Lucas, 12 Peters, 458, it was insisted, that the only objects of the acts of Congress being to ascertain what property had been acquired by individuals before the cession, the commissioners were to act only on original claims, and by confirming the rights of the original owner, to leave the derivative right under him entirely open between adverse claimants. The court, however, held, that this view of the case could not be sustained, and said, that it was inconsistent with all the acts of Congress which have organized boards of commissioners for adjusting land titles, the proceedings of the board, and the laws which have confirmed them; that it would defeat the whole object of these laws, and introduce infinite public mischief, to hold that the confirmations by the commissioners and Congress, made

expressly to those who claim by derivative titles, did not operate to their own use.

We believe that we have now considered all the questions raised by the charges which were given, and those which were prayed for but refused, and without prolonging this opinion, already too prolix, by an application of them to each charge, we conclude by saying that the Circuit Court committed no error, which was prejudicial to the defendants below.

EVANS *vs.* BATTLE, *et als.*

1. If the allegations of the bill do not correspond with the evidence, no decree can be rendered in favor of the complainant, although the proof may show that he is entitled to equitable relief.
2. A court of equity will not specifically enforce a parol gift of land.
3. But when the donee has taken possession of the land under the parol gift, and made improvements thereon, equity will not allow the donor to reclaim the possession, without making compensation to the donee for the improvements.

ERROR to the Chancery Court of Wilcox. Tried before the Hon. J. W. Lesesne.

THE allegations of the bill, so far as they are material to the questions of law raised in this case, may be thus stated: The complainant became the security of Harris Smith Evans upon a note to Sanford Cooley, for $1,127 59, due at twelve months from date, and also became the joint security with said Harris Smith Evans for one Ellison, on a note of $2,000. The complainant has been compelled to pay the note to Cooley, and said Ellison being insolvent, he has compromised that debt, paying some $700 to obtain his discharge. Before, however, these payments were made, Harris Smith Evans had died, and his estate had been reported insolvent, and the assets fully administered. The bill further alleges that Thomas Evans, the father of Harris Smith Evans, some time in the year 1831, did give the

lands in controversy to the said Harris Smith Evans, and executed an instrument in writing evincing the absolute and unqualified character of the gift; that Harris Smith Evans took possession of said lands, cleared a plantation upon it, erected a dwelling and other buildings, and made other valuable improvements upon the land; that he occupied and cultivated it until his death, which happened in 1839. Thomas Evans, the father, died before Harris Smith Evans, the son, and after the death of the latter, who died unmarried, without children, the administrator of the father applied to the Orphans' Court, and obtained an order to sell said lands as property belonging to the estate of Thomas Evans. A decree of sale was obtained, and the lands sold as the lands of Thomas Evans, and were purchased by James Battle on account of himself and George M. Rives, who were merchants and partners residing in the city of Mobile. Battle and Rives had both married the daughters of Thomas Evans, and were intimate with both Thomas Evans, the father, and Harris Smith Evans, the son. The bill also alleges that said Battle and the brothers of Harris Smith Evans had access to his papers after his death, and that they had suppressed and destroyed the deed or instrument in writing evincing the gift of the lands from the father to the son. The bill prays that the sale of the lands to Battle, under the decree of the Orphans' Court, be declared fraudulent, and that the land be decreed to be sold as the property of Harris Smith Evans for the purpose of paying the complainants' demand, and concludes with a prayer for general relief.

The answers, in conjunction with the evidence, establish these facts: The lands were purchased by Thomas Evans and the titles were taken in his name, but that Harris Smith Evans entered into possession of them in 1831, made valuable improvements and occupied them until his death. During the life of Thomas Evans, he frequently spoke of the lands as the lands of his son, Harris Smith Evans, but never executed any deed to him, nor any instrument in writing, as evidence of the gift. Thomas Evans died greatly embarrassed, and the lands were sold as belonging to him, for the purpose of paying his debts, no objection being then made to the sale by the administrator of Harris Smith Evans or any one else. But Battle knew that Harris Smith Evans had occupied and improved the lands at the

time he made the purchase, and it was admitted that Thomas Evans had paid for and on account of his son, Harris Smith Evans, the sum of fifteen thousand dollars, as alleged in the answers.

T. Williams, for plaintiff in error:

This case presents only two questions: 1. Is a parol gift of lands from a father to his son within the statute of frauds in this State, when at the time of the gift the son takes possession with the knowledge and consent of the father, and clears land, builds houses, and completes other improvements exceeding in amount the value of the land, which possession or improvements are not disturbed or interfered with by the father up to his death, including a period of seven years? Damage to the promisee constitutes as good a consideration as benefit to the promissor.—2 Pet. 182; 2 Bibb 30; 2 J. J. Marshall, 222; ib. 120. The removal of a son-in-law from the county in which he resides, at the request of his father-in-law, and settling here, is a valid consideration for a deed of conveyance.—Lit. Select Cases, 30. A father promised his daughter that if she would come and live with him she should have his estate. He afterwards drove her off and willed his estate to another. It was held that she was entitled to the estate.—Gray v. James, 4 Dess. 185. A slight consideration will support an agreement made by a parent with his child, but the consideration, however slight, must be performed.—Simmons v. Hill, 4 H. & McH. 252.

In the following cases parol gifts of lands from father to son, where the son went into possession and made valuable improvements, have been supported: Young v. Glendening, 6 Watts 509; Syler v. Eckhart, 1 Bin. 378; Worcester v. Eaton, 13 Mass. 371. The cases in 1 Leigh 36, and 2 ib. 569, differ from the cases above cited in this, that in neither of them were any improvements made, or any loss sustained. In view of all these authorities, it is respectfully submitted, that the decision in Forward et al. v. Armstead, (12 Ala. 124,) cannot be supported.

2. If the parol gift cannot be sustained, is the son entitled to compensation for the value of his improvements? The case of Evans v. Evans, (8 B. Mon. 566,) is a direct authority in favor of the claim for compensation. It is objected that Thomas Evans had paid for his son an amount of money largely exceeding

the value of these improvements. But we insist that we are at least entitled to an account to ascertain on which side the balance is.

It is also objected that the bill alleges a deed as the foundation of the relief prayed, and therefore we cannot set up a claim under a parol gift. To this we answer, that the material allegation of the bill is that the land belonged to the son, and it is immaterial whether he held by parol gift, deed or patent. If the objection would have any force against a bill filed by the son himself, it ought not to prevail in this case, where the bill is filed by a creditor, who cannot be presumed to know the exact nature of the title.

John A. Campbell, *contra*:

1. The allegations of the bill are not sustained by proof. There is no proof whatever of the written instrument on which the suit is founded. The plaintiff cannot recover upon a case not made by his bill.—5 Port. 9; 1 Ala. 330.

2. The suit is improperly brought. It should be brought by the representatives of H. S. Evans, or, if they refused to proceed, then by those creditors who have established their claims against his estate.—1 Hill's Ch. R. (S. C.) 297; 3 Barb. Ch. R. 427; 2 ib. 35; 11 Sm. & M. 369; 12 ib. 547; 3 Por. 470.

3. A court of equity will not enforce an incomplete gift. The case of Forward v. Armstead, (12 Ala. 124,) must be decisive of this. See also 6 Ves., jr., 662; 12 ib. 39; 4 M. & C. 647; 1 Craig & Phil. 138; 1 Beav. 140.

4. The complainant is not entitled to compensation in this suit for valuable improvements made by the son. 1. Because that is not the object of this suit, and the claim is inconsistent with the allegations of the bill.—6 Rand. 658. 2. The evidence shows that Thomas Evans paid at least $15,000 for his son, which is more than the value of the improvements.

DARGAN, C. J.—The complainant has wholly failed to prove that Thomas Evans, the father, ever executed a deed of gift for the lands in controversy, or any instrument in writing, evincing a gift from him to his son, Harris Smith Evans. This defect of proof would probably be fatal to the bill independent

of all other objections; for however clear the proof may be, to show that the complainant is entitled to equitable relief, yet, if his allegations do not correspond with his evidence, no decree can be rendered for him. Proof alone will not entitle a party to relief, but it requires both allegations and proof, and they must correspond.—Clements. Adm'r. v. Kellogg, 1 Ala. 330; Goodwin v. Lyon, 4 Por. 297; Morgan v. Crabb, 3 Por. 470; Dunn v. Walker & Parsons, 5 ib. 345. But independent of this objection, and assuming that the allegations of the bill are applicable to the evidence, I cannot doubt but that the chancellor correctly dismissed the bill. The only pretence of title in Harris Smith Evans, as shown by the evidence, can amount only to this, that Thomas Evans, the father, made a parol gift of the lands to his son, who took possession and made valuable improvements upon them. Before we can decree the lands, therefore, to be sold as the property of the son, we must specifically execute the gift from the father to the son, which beyond doubt, was volununtary and without consideration moving to the father at the time it was made. In the case of Antrobus v. Smith, (12 Ves. 39) the Master of the Rolls put the question to the counsel, do you recollect any instance in which a party was compelled to perfect a gift even in favor of a child? The reply was, that the relief sought in that case did not require any act to be done in order to perfect it. In the decree that was rendered it appearing that the gift was not complete, the relief sought was refused. In the case of Ellison v. Ellison, (6 Ves. 656,) the distinction as to volunteers was taken, and it was held that the assistance of the court could not be had without a consideration to constitute one *a cestui que trust*, but if the act of the parties was complete, and the legal title absolutely conveyed, though without consideration, then a court of equity would enforce the trust. In the case of Jeffreys v. Jeffreys, (1 Craig & Phil. 138 and 141,) a father, by voluntary settlement, conveyed certain freehold, and covenanted to surrender certain copyhold estates to trustees, in trust for his daughter. He afterwards devised a part of the same lands to his wife, who, after the death of the testator, was admitted to the copyhold estates. A bill was filed by the daughter to have the trusts executed, and to compel the widow to surrender the copyhold estate to which she had been admitted. The chancellor said that the title of the plaintiff to the freehold

was complete; and a decree, so far as the freehold was concerned, was rendered, carrying into execution the trusts; but in respect to the copyhold which the father had covenanted to surrender to the use of his daughter, the chancellor said, "I have no doubt that the court will not execute a voluntary contract, and my impression is, that the principle is the same, whether the complainant seeks the benefit of a contract, a covenant, or a settlement." He, however, held up the decision to examine the case of Ellis v. Nimmo, which had been pressed in the argument, but on a subsequent day he said he saw no reason to change his opinion.

I take it to be the settled law that if the gift is complete, and the donor has parted with the legal title, that a court of equity will then execute the trust, because the relation of trustee and *cestui que trust* is established by the act of the donor. But if the gift is not complete, if the legal title still remains with the donor, and it requires another act to be done in order to establish the relation of trustee and *cestui que trust*, or to divest the donor of the legal title, a court of equity will never do that act, or compel it to be done, without a consideration. The case of Forward v. Armstead, (12 Ala. 124,) is very analagous to the case now before us. There a father residing in Alabama wrote to his son, residing at the time in North Carolina, that if he would remove to this State, he would give him certain lands and slaves. The bill alleged that the son, confiding in the promise of the father, did break up and remove to this State at great loss and expense, and that his father, in part performance of his promise, had put him in possession of the land and slaves, and that he had opened a plantation and made valuable improvements on the land. This court, waiving the consideration of the right of the son to compensation for the improvements, held, that the promise of the father, being merely voluntary, could not be specifically enforced by a court of equity. We think this case is in conformity with the settled rules of law, and is conclusive to show that the lands in the present case could not be treated as the estate of Harris Smith Evans, and as such decreed to be sold in payment of his debts.

But it is contended that Harris Smith Evans was entitled to compensation for the improvements made upon the land under the circumstances disclosed by the proof, which should be charged

upon the land, that therefore the cause should have been referred to the register to take an account of the value of the improvements, and from the amount that might be ascertained to be due to him the complainant's debt should have been satisfied.

I entertain no doubt but that the son would have been entitled to an account for the improvements; for although a court of equity will not specifically enforce a parol gift of land, yet, if the donee enter and make improvements upon it, a court of equity would never allow the donor to reclaim the possession of the land without making compensation for the improvements. This would be to allow him to make profit by the labor and expense of the donee, when such labor and expense were bestowed under a promise that the donee should have the land. But the bill is not framed for this purpose, and the allegations are insufficient to warrant such relief. Independent, however, of this, it was admitted that Harris Smith Evans was indebted to his father's estate in the sum of fifteen thousand dollars. In taking the account, of course, this debt would have to be accounted for, before any thing could be decreed to the administrator of the son, or to any of his creditors; and, from the entire proof, I think it is manifest that the value of the improvements could not equal this sum. A reference was therefore unneccessary; it could not have benefited the complainant.

There is no error in the decree and it must be affirmed.

RUGELY & HARRISON *vs.* ROBINSON *et al.*

R. & H. filed their bill in equity against E. T. R. and W. R., seeking to condemn to the satisfaction of a judgment at law, which they had obtained against the said E. T. R., (on which judgment an execution had been issued and returned "No property found,") his interest in certain lands and slaves which had been bequeathed by his father to W. R., "to have and to hold the same in trust for the benefit of E. T. R., but the same shall not be subject to the payment of any debt that he may owe, nor shall the rents and profits of the land or the hire of the slaves be applied for the same object, but the same

shall be held for the use and benefit of the said E. T. R. and his family, during the term of his natural life, and from and after his death to the use of such persons as the same may be devised and bequeathed by the said E. T. R. in his will; and in the event no will shall be made, then to the heirs at law of the said E. T. R." The defendant insisted that he did not have such an interest in the property bequeathed as could be subjected to the payment of his debts, and also relied on his discharge under the Bankrupt Act, obtained subsequently to the rendition of the judgment against him. R. & H. did not prove their claim in the Bankrupt Court against E. T. R., nor was his interest in the trust property surrendered in his schedule by E. T R. The Chancellor dismissed the bill, but the Appellate Court reversed his decree, and held that the interest of E. T. R. in that portion of the property from the employment of which a revenue was to be derived was capable of separation by an account ascertaining his share in the nett product, and that such share, when so ascertained, was liable to be subjected to the payment of his debts. The cause was remanded, that an account might be taken, and that other parties might be added. The bill was amended by making the wife and children of E. T. R., and also the assignee in bankruptcy, parties defendants. It was proved, *inter alia*, that after the testator had made his said will, he verbally requested W. R. to give to said E. T. R. a certain warehouse and ten acres of land; that W. R afterwards refused to comply with this request, but permitted E. T. R. to rent out the property and receive the rent for three or four years; that T., to whom the property was rented for one year, executed his note for the rent payable to W. R., together with a mortgage on two slaves, to secure its payment; that the slaves were sold under the mortgage, and purchased by W. R. in his own name, and were afterwards delivered by him to E. T. R.; that E. T. R. had purchased three negroes from W. R., which were to be paid for out of the trust estate, but the purchase money had not been paid. W. R. claimed to have a mortgage on said three negroes for the payment of the purchase money, but no proof was made relative to it. *It was held*—

1. That the correctness of the former decision of the Appellate Court could not be questioned, either by the assignee in bankruptcy or by the wife and children of E. T. R., inasmuch as the former was not injured by said decision, and the interest of the latter was fully represented before the court at that time by the trustee.
2. That the amendment only put in issue such facts as would avoid the discharge in bankruptcy, which the original defendants had set up, or show that it did not operate on the property sought to be condemned, and was therefore not obnoxious to the objection of making a new case different from that presented by the original bill.

3. That the legal title to the slaves purchased under the mortgage did not vest in E. T. R. until the delivery to him, and until that time he did not have such a beneficial interest in them as could be subjected by his creditors, at law or in equity, to the satisfaction of their demands.
4. That the omission of E. T. R. to include in his schedule his interest in the trust property, thus bequeathed by his father, was not such a fraud or wilful concealment as would vacate *in toto* his certificate of discharge as a bankrupt.
5. That a charge in the bill that the failure of E. T. R. to surrender in his schedule his interest in the trust property *amounted in law* to a fraud which should vacate his discharge, was not equivalent to a charge of fraud or wilful concealment of his property.
6. That although it is a general rule, that to enable the creditor of a bankrupt to maintain a suit in equity to subject to the satisfaction of his debt property belonging to the bankrupt, he must allege in his bill some collusion between the assignee and the debtor, or that the assignee refuses to bring suit, yet when the assignee has neglected for more than five years to institute proceedings to obtain the condemnation of the bankrupt's interest in certain trust property, and in the meantime a creditor has ferreted out that interest, and after a protracted litigation, obtained a decree subjecting it to the satisfaction of his debt, the assignee will be presumed to have abandoned his claim, and he cannot assert it against such creditor.
7. The assignee having no claim to the property which he could assert against the complainants, none of the other defendants could take advantage of E. T. R.'s discharge under the Bankrupt Act.
8. That the State courts have jurisdiction of the case established by the bill, answers and evidence. The rules of interpretation which obtain in the Federal courts as to the construction of the Bankrupt Act will be applied by the State courts.
9. That W. R. and E. T. R. having admitted in their answers the due issuance and return of the execution against E. T. R., an objection to the sufficiency of the return could not afterwards be raised, either by them or any of the other defendants.
10. That a defendant cannot raise the objection that an execution was not sent to the county of his residence, unless he shows that he had visible property in that county which was liable to its satisfaction.
11. That the other creditors of E. T. R. were not necessary parties.
12. That it was not necessary or proper, in stating the account, that any allowance should be reported for the family of E. T. R.
13. That E. T. R. was not entitled to compensation for his services

in superintending the trust estate, no such claim having been set up in his answer, and no proof made before the master of any contract between him and trustee for such compensation.

14. That the three negroes which were purchased from W. R. by E. T. R. were properly taken into the estimate in stating the account.

ERROR to the Chancery Court of Lowndes. Tried before the Hon. J. W. Lesesne.

THIS case was before the Supreme Court at the June Term 1846, and is reported in 10 Ala. 702. Rugely & Harrison, the complainants, had obtained a judgment at law in 1836 against Eli T. Robinson and Edward Couch, on which an execution had been regularly issued and returned "No property found." In 1844 they filed their bill in equity against Eli T. Robinson and William Robinson, seeking to condemn to the satisfaction of their judgment Eli's interest in certain property, consisting of lands, negroes and other personal property, which had been bequeathed by his father, Tod Robinson, to William in trust for Eli. The language of the clause is as follows, viz: "I give and bequeath unto my son William Robinson, and his heirs, all that tract of land," &c., (here follows a description of the property,) "to have and to hold the same in trust for the benefit of my son Eli Robinson; but the same shall not be liable for the payment of any debt that he may owe, nor shall the rents and profits of the lands or the hire of the slaves be applied for the same object; but the same shall be held for the use and benefit of the said Eli T. Robinson and his family during the term of the said Eli's natural life, and from and after his death to the use of such persons as the same may be devised and bequeathed by the said Eli T. Robinson in his will; and in the event no will shall be made, then to the heirs at law of the said Eli." The defendant in his answer, among other things, set up his discharge under the Bankrupt law, obtained in 1843. The Chancellor dismissed the bill, but his decree was reversed by the Supreme Court, and the cause remanded, that an account might be taken to ascertain the share of Eli in the nett product of the trust property from the employment of which a revenue was to be derived, and also to bring in the assignee in bankruptcy, and the wife and children of Eli. The account was taken accordingly, and the necessary parties added, and the cause now comes back to the Supreme Court on

cross assignments of error by the complainants, and the several defendants. The errors assigned, and the points raised by each party, appear in the briefs, and in the opinion of the court.

SAFFOLD for Rugely & Harrison :

1. Is the former decision of this case by the Supreme Court binding on the wife and children of Eli T. Robinson and the assignee in bankruptcy? The amendment does not make a new case. It is founded on the allegations of the answer, and the new defendants set up no new defence. The interest of the assignee consists in having the property condemned, and the interest of the wife and children was fully represented and protected before the court.—10 Ala. 702; 4 S. & P. 62; 1 Por. 321; 1 Wheat. 304; 2 A. K. Marsh. 353; 7 Wheat. 58; 12 Pet. 488; 3 How. 413; see also Ram on Judgments, 53, 127-28-29, 134, 137; 1 Wm. Black. 264; 3 Bing. 599; 8 Durn. & E. 503; 3 Barn. & Adol. 17; 1 Lord Raymond, 516; 6 Barn. & Cres. 566; 4 Barn. & Adol. 38; 3 Aik. 16.

2. Conceding that the former opinion is not conclusive on this court, still it should be supported because it correctly asserts the law. See 10 Ala. 702; and cases there cited on brief and in opinions.

3. As to the assignment that the assignee should be allowed to come in and claim this interest of Eli's. The interest sought to be condemned was never claimed by the assignee, except in his answer to the amended bill in this case. He was not bound to incur costs in such a case as this, by instituting legal proceedings to condemn this property; nor can he now come in, and wrest it from complainants, who have succeeded in obtaining it condemnation after an expensive litigation of six years. He ought to have asserted his claim in a proper way, and within a reasonable time, two years at least. By not asserting it within that time he will be held to have waived it.—Eden on Bankruptcy, 344, (32 Law. Lib. 263;) 1 Henry Black. 665; 2 ib. 402; 4 Term R. 193; 3 Swanst. 365; 3 Meriv. 279; 1 Branch 219; 1 U. S. (annual) Dig. 86, § 122; 13 Ala. 388; 6 Law R. (Nov. 1843,) 313; 4 Johns. R. 556; 4 Johns. Ch. 691; 8 Sm. & Mar. 710; 9 ib. 27; 1 Sandford's Ch. R. 135; 8 Ala. 194; 12 ib. 666.

4. As to the jurisdiction of the State Courts. There is no

proof that complainants had any notice of the proceedings in bankruptcy; they never proved their claim in the Federal Courts; the property sought to be condemned was never surrendered by the bankrupt; the assignee has not taken any proper step to subject it; the bill charges fraud in the omission to surrender it; there is no proof that there are any other creditors.—8 Ala. 198-200; 12 ib. 666; 6 Law Reporter, (Nov. 1843,) 313; 8 Smedes & M. 710; 9 ib. 27.

5. As to the error assigned by the wife and children of E. T. R., that as to them there is no proof of complainants' demand, this is founded on a mistake of fact, as the record shows.

6. The negroes Andrew, Parmelia and George should have been condemned absolutely to the satisfaction of complainants' debt. The answers of E. T. R. and W. R., and the proof establish conclusively, that there was a secret trust in these negroes for the benefit of E. T. R. W. R. had allowed him to receive the rents of the warehouse, &c., for several years, and there is no difference between the receipt of the rent in negroes, and the receipt in money.

WILLIAMS & CAMPBELL, *contra:*

The former decision of the court is not conclusive either on the assignee or the wife and children of E. T. R. The court only decided that they were necessary parties, and explicitly reserved the question of the sufficiency of the bill and its allegations as to them. The interest of Eli vested in the assignee; Rugely and Harrison had no lien which was protected by the bankrupt act. Their judgment did not bind the lands devised to W. Robinson in trust for Eli. There was nothing to intercept the operation of the bankrupt act.

The bill is fatally defective for the want of those averments which are necessary to give the court jurisdiction. Before the complainants could sue for this property, they should have proved their demand, and applied to the bankrupt court to compel the assignee to sue for its recovery. They cannot depart from the court of exclusive jurisdiction, and without a compliance with any of its rules and orders, and seek to collect their debt out of property which was never surrendered by the bankrupt, nor claimed by the assignee. There must be a special ground laid in the bill, to the effect, that the District Court had been applied to, and had refused to act, or that the assignee had been

applied to, and had refused to act, or there must be a charge of collusion or fraud. The assignee could have recovered the interest of the bankrupt by a summary application to the bankrupt court, or by a direct suit, and he would have held it for those creditors who proved their demands.—Story's Eq. Pl. §§ 516-726-495; 1 Young & C. 172; 11 Con. Eng. Ch. R. 306; 8 Sim. 28; 1 Johns. Ch. 305; 8 Ala. 694; 3 How. 292; Calvert on Part. 199.

The bill is equally defective in the averments and proofs necessary to give the court control of the cause. It must be shown that the defendant was sued to judgment, and an execution issued to the county of his residence, and returned "no property found." The averment of residence is made, but it is denied by the answer, and is not supported by proof. The execution was returned "*nulla bona*," which is a nullity.—Reid v. Wheaton, 7 Paige, 663; 1 Dana, 516; 1 Clarke's Ch. R. 265-315; 1 Ala. 104; 7 ib. 318; 14 ib. 753; 10 ib. 433; 1 Barb. & H. Dig. 339; 3 Mylne & Craig, 407.

Even if the averments were sufficient, the decree would be erroneous. It should have been in favor of all the creditors.—1 Hill's Ch. R. 338; 4 Johns. Ch. 619.

The interest of Eli in the trust property was not such as could be subjected by his creditors to the payment of his debts. He had no legal estate, but only a "use or benefit" such as could not be reached by his creditors. The trustee would have violated his duty, if he had allowed any other interest. The general proposition laid down by the court, in their opinion condemning this interest, is too absolute. No consideration is allowed to the will of the testator, which is sacrificed to what is termed "public policy." Public policy requires that a man shall not have an estate provided for his separate enjoyment, and yet not liable to his debts. The manifest intention of the testator was that Eli should only have such an interest as could not be subjected by his creditors. *They* had no claim upon the testator's bounty, and cannot complain of any disposition that he may choose to make of his property. The proper inquiry would have been, not whether Eli's interest could be separated, but whether the trustee could possibly apply the property for the benefit of Eli *and his family* as directed by the will, and yet give Eli a separate interest. The whole object of the trust was for the *joint use and benefit, and common enjoyment* of the family.

CHILTON, J.—This case has been twice argued, and we proceed, with all possible brevity and simplicity, to decide the questions raised by the cross assignments of error. When the cause was in this court at a previous term, (see 10 Ala. R. 702), it was held by our predecessors, that as to the property bequeathed by the will of Tod Robinson to William Robinson, for the use and benefit of Eli T. Robinson and his family, and from the employment of which a revenue was to be derived, the interest of Eli was capable of separation by an account ascertaining his share in the nett product, and that such share when so ascertained, was liable to be subjected to the payment of his debts.

The case was remanded to the Chancery Court for a defect of parties, and after its return to that court, the wife and children of Eli Robinson, as also Edward F. Comegys, the assignee in bankruptcy, were added as parties defendants, by an amendment to the original bill.

1. The counsel for the defendants insist that the former decision of this court should not be considered as conclusive upon the rights of these new defendants who were not then before the court; and they strenuously contend that the court in that opinion mistook the law. Are we at liberty to disregard the former decision, were we disposed to do so, or is it obligatory upon us as settling the law of this case? Ordinarily courts very properly refuse to determine questions affecting the merits of a cause, in the absence of any person who is a necessary party, and whose interest may be prejudiced by such decision, for the obvious reason that the rights of no one should be judicially determined, without affording him an opportunity of protecting them. Without, however, now deciding what would be the correct rule when the decision affects the rights of parties wholly unrepresented upon the former trial, it is quite sufficient in this case to observe, that Comegys has not been injuriously affected by the previous decision, since, if he has any interest in this fund, that interest consists in having it declared subject to Eli's debts, and this is the gist of the opinion sought to be avoided. And as to the wife and children of Eli, they were represented, or rather their interest was protected by the trustee, at whose instance the question of the liability of Eli's interest was raised, and ably argued before and pressed upon the court, as the report of the case will show. We see nothing in this case which would justify us in

departing from the well established rule, that when a case is brought the second time before this court, we will not question the correctness of the law under which it was first decided.—Meredith v. Nash, 4 S. & P. 62; Gee v. Williamson, 1 Por. 321; Goodwin v. McGehee, 15 Ala. R. 239.

2. But it is argued that the amendment makes a new case, and that consequently it should have been disallowed. We do not think so. The object of the original bill was to subject the equitable estate of Eli in the hands of William, to the satisfaction of the complainants' judgment, which remained unsatisfied after exhausting their legal remedy. The defendants seek to avail themselves of Eli's bankruptcy, as a defence to the bill. To meet this defence, it became indispensable for the complainants to put in issue such facts, as would either avoid the discharge entirely, or show that it did not operate upon the property sought to be condemned, and this office the amendment to the bill in the case before us appropriately performs.—See the opinion in this case, 10 Ala. 702.

3. Having disposed of these preliminary points respecting the former decision, and the case authorized to be made by it, we proceed to the consideration of the alleged error assigned by Rugely and Harrison; namely, that the chancellor should have condemned three slaves, Andrew, Parmelia and George, to the satisfaction of their judgment, and should have decreed them to be sold, and the proceeds appropriated accordingly.

We have examined this voluminous record with much care to arrive at a correct knowledge of the situation of this property, and we think it very clear, that no trust was created by the verbal request made by Tod Robinson of William, to give to Eli the ware-house and ten acres of ground at Lochranza. It was a request which William had an election to comply with, or not, at his pleasure, and the court of equity could not have compelled him to comply with it. William, however, refused to comply with his father's request, but allowed Eli to rent the property, and to receive the rents for three or four years. It appears that the property was rented to one Tully, who executed his note for the same payable to William, together with a mortgage on two of these slaves to secure the payment of the same. The slaves were sold under the mortgage, and purchased in William's name by one Conly, on the 6th day of March, 1843, William

refusing to allow any thing to be done in relation to this matter except in his own name. He then put them in possession of Eli, and they were worked in the crop with the other hands. Assuming that the receipt of the rent by Eli, mentioned in the answers of defendants, was in these slaves, the question arises, being a gift *inter vivos*, when did it become complete so as to vest the beneficial property in the donee? To answer this question, we have but to suppose that William, after he had purchased these slaves, had refused to deliver them to Eli, could the latter have maintained any action for their recovery? It is very certain he could not. It is essential to a gift *inter vivos*, that there be a delivery to the donee, and that the property in the thing given immediately pass to him, and that it be irrevocable by the donor. An exception to this rule obtains when the gift is by deed, duly consummated.—Banks v. Marksberry, 5 Lit. R. 278; Duncan's Adm'r v. Duncans, ibid, 12; Hunley v. Hunley, 15 Ala. 104, and cases cited. In such case the execution and delivery of the deed passes the property and renders the gift irrevocable.—Ib. This gift, being by parol, was incomplete before the delivery of the property; and where it is incomplete, equity will not interfere to complete it, but will leave the parties where the law finds them.—2 Story's Eq. Juris. § 706, a, and cases there cited. Conceding, then, that the delivery of these slaves by William to Eli perfected the gift, we are of opinion that anterior to that period William reserved a control over the rent and the notes given therefor, inconsistent with the idea of absolute property in Eli. It follows, therefore, as these slaves were delivered to Eli after he was declared a bankrupt by the decree of the District Court, they are not subject to the complainants' demand, unless they can set aside his discharge for fraud or wilful concealment of his effects, which should have been rendered in his schedule which accompanied his petition.

4. Let us then address ourselves to this inquiry, as the next in order. Conceding that Eli's interest in the property bequeathed by the will of his father to William, in trust for the benefit of himself and family, was such as should have been surrendered by him on his petition, and that he failed to embrace it in his schedule, it does not necessarily follow that the effect of such failure is to vacate *in toto* the certificate of discharge. It is hardly to be expected in any case, that an applicant for the

benefit of the Bankrupt Act should be able to set forth every article of property and every interest which he may have. Some he omit through mistake; others he may, consistently with the utmost good faith, conclude do not pass to the assignee under the decree in bankruptcy, and therefore need not be mentioned by him. The interest above alluded to, we think, is of such a character as to forbid the inference of fraud as a legal conclusion from the bankrupt's omission to set it forth in his schedule of effects. Its liability to the administration in bankruptcy was a question of much difficulty—one upon which learned jurists have differed, and upon which this court was divided, when called upon after solemn argument judicially to determine it.—10 Ala. 702. That the bankrupt, unskilled as we presume he is in intricate legal questions, should have supposed it not subject, and have acted upon such supposition, certainly is no evidence of the want of purity of intention, which should overthrow his discharge and stamp his conduct as fraudulent.

To set aside the discharge, there must be *fraud* or *wilful concealment* of his property or rights of property on the part of the bankrupt. This is neither averred in the bill nor shown anywhere in the record before us. True, the amendment to the bill charges that Eli's failure to render it in his schedule amounted to a fraud in law which should vacate the discharge. But this is but the assertion of an erroneous legal proposition by the pleader, unauthorized by the fact upon which he predicates it.—See Lond v. Pierce, 12 Shep. 233; Robison v. Wadsworth, 8 Met. 70; Burnside v. Brigham, ib. 75. It results from this view, that the Chancellor did not err in refusing to condemn these slaves, and that they are not liable, having been acquired after the discharge in bankruptcy, to the complainants' demand.

5. Let us next proceed to examine the errors assigned by the defendants below. Their main objection is, that immediately upon the decree in bankruptcy, the interest which Eli had in this property, (if he had such interest as was subject to his debts) passed to the assignee, and that the creditors, who have no lien which can override the decree in bankruptcy, cannot resort to a court of equity without alleging in the bill that the assignee refuses to sue for the property, or that he colludes with the other defendants, or some of them, with respect to the interest sought to be condemned.

It is readily conceded, as a general rule, that after a person has become bankrupt and assignees are appointed, neither the bankrupt nor any of the creditors can ordinarily maintain any suit against a debtor to his estate, or to reduce any of his property into possession; for the right belongs to the assignees, and to give the creditor an equitable right of action, he must aver in his bill some collusion between the assignee and the other party, or that the assignee refuses to bring suit for the benefit of the bankrupt and of his estate.—Story's Eq. Pl. § 516. These certainly constitute the ordinary grounds upon which the aid of the court of equity is invoked; but it by no means follows that they are the only facts which give jurisdiction. Cases may and do arise, the peculiar circumstances of which call fully as loudly for equitable interposition, in order to prevent a failure of justice. We think the case before us is one of them, as a brief sketch of it from the record may suffice to show.

The complainants having obtained a judgment at law in March, 1836, and a return of "*nulla bona*" by the sheriff of the county in which the judgment was rendered, on the 18th September, 1844, filed their bill, alleging that they had exhausted their legal remedy, and that the defendant had property bequeathed in trust for his benefit, and praying that his interest might be subjected to the satisfaction of their demand. In reply to this demand, the judgment debtor denies that the interest sought to be condemned is subject, and insists also as a defence, that on the 9th September, 1842, he filed his petition in bankruptcy and obtained his certificate of discharge on the 25th of May, 1843. A protracted, and doubtless very expensive litigation ensued. The chancellor dismissed the bill, but this court reversed his decree and remanded the cause. In this proceeding it is ascertained that the assignee in bankruptcy is a necessary party. He was brought in by an amendment filed 30th October, 1846. After a delay of some nine months, the assignee answers the bill, and denies the right of the State court to entertain jurisdiction of the cause. He insists upon his right to the property which the bill seeks to condemn, and says that he has never abandoned it, but claims it for the benefit of the creditors of the estate. It appears from his answer that Eli T. Robinson was declared a bankrupt on the 7th day of December, 1842. It thus appears that near five years intervened after the decree in bankruptcy,

and about three years after the original bill was exhibited, before any claim was set up by the assignee, whereas, the bankrupt statute required that "all the proceedings in bankruptcy in each case, shall, if practicable, be finally adjusted, settled and brought to a close by the court, within two years after the decree declaring the bankruptcy;" and that "no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property or rights of property of the bankrupt, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall have first accrued." Notwithstanding this provision for the speedy settlement of bankrupts' estates, and although this litigation was in progress, and the bankrupt had control and possession of this property from 1843, deriving his interest from the will of his father, proved and admitted upon the public records of the county in 1838, we say, notwithstanding all this, no claim is set up on the part of the assignee to Eli's interest, nor any effort made to investigate the character of his title. No proceedings whatever were instituted in the bankrupt court, or elsewhere, by him, to subject this interest to the administration in bankruptcy. And now, that more than six years have elapsed since the original bill was filed, while the record exhibits the assignee as contesting the complainant's right to subject this property, it fails to show that he has taken, or intends to take, any steps to subject it himself. He says he claims this property, and ought to be allowed to assert such claim for the benefit of the bankrupt's creditors; but he does not show that any creditors proved their demands in the bankrupt court. He claims it, but not until after the complainants have, by a protracted suit, ferreted it out and obtained the opinion of this court subjecting it. He connects his claim with no proposal to become the receiver of it for distribution by the appointment of the court, nor does he tender any amends for the expense which the complainants have incurred in condemning it. Under such circumstances we feel fully justified, and indeed required, by our view of the law, to regard his claim as *clamor et præterea nihil.*

We will not say that under all the circumstances attending this interest, the assignee in bankruptcy was bound to make any

effort to subject the property, or separate the interest of Eli. It has been held, and we think correctly, that although all the property and rights of property of the bankrupt are, by the decree, vested in the assignee, still he is not bound in all cases to take possession of every part.—6 Law Rep. 313. There may be rights of property of such doubtful character, and hedged about with so much of difficulty and embarrassment, as to require more expense to arrive at them than they would profit the estate when obtained. In such case the assignee should be allowed to exercise a sound discretion at his peril, and if he acts in good faith, and uses due caution, a court of equity would always protect him.

In Copeland v. Stephens, (1 B. & A. 573,) cited in the above case, it was held that under the English bankrupt law, the assignee was not bound with regard to leasehold estates to take the lease and charge the estate with the payment of the rent, because the rent may be more than the value of the lease, and thus a burthen rather than a benefit would be derived to the estate. So in regard to this case, it may be that the interest of the creditors has been promoted by the failure of the assignee to take any steps to recover the interest of Eli. Having this election whether to proceed or not for its recovery, he should have exercised it within a reasonable time; at least, we think, within two years from the time of the decree, within which period, the act contemplates the whole business shall be brought to a close. Failing to proceed, the creditor had the right to regard his claim as abandoned, and to proceed, after the assignee had neglected to do so for an unreasonable length of time, to subject the interest, disregarding the assignee's claim. To turn the complainants out of court, in order to give the assignee further time to elect, after what has transpired, would, in our opinion, be highly inequitable, and is required by no rule of law.

6. The claim of the assignee aside, it is quite clear that the defendants cannot avail themselves of the discharge of Eli, to protect him in the enjoyment of property which he never surrendered to the assignee in bankruptcy. To hold that the assignee should hold as against a creditor who never proved his demand in the bankrupt court, all the property which the bankrupt failed to render in his schedule, either through fraud or mistake, would be to tender a premium for fraud or negligence,

and would contravene the obvious spirit and meaning of the act. But as the record presents this case, neither this property nor these complainants have had any connection with the administration of the bankrupt's estate. The interest, as we have said, was never surrendered or claimed. The complainants did not prove their demand in that court, nor are we advised that they were ever, in any way, notified of the proceedings there had. Assuming, then, what we have endeavored to show, that the assignee has no claim which he can interpose to defeat the complainants' right to a condemnation of the interest of Eli, this interest remains subject to be decreed in satisfaction of their demand as though no decree in bankruptcy had been obtained.

7. Neither is there any objection to the State court entertaining jurisdiction. The bankrupt court in a proper case, and on a timely application by the assignee, in the exercise of the equity powers which were considered as conferred by the act, in order to render its provisions effectual, might perhaps have controlled the parties so as to have drawn the litigation into that court; but nothing of this kind was attempted or is proposed to be attempted. So long as the parties are left free to proceed in the State Court, that court will administer justice between them, irrespective of what might have been done in the Federal Courts, applying however the rules of interpetration of the bankrupt act which obtain in that court, when they are applicable.—Russell v. Cheatham, 8 Sm. & Mar. 703, and cases cited.

8. It is objected that the complainants have not exhausted their legal remedy, the return upon the execution by the sheriff being in Latin, "*nulla bona.*"

Without instituting any inquiry as to the sufficiency of this return, it is a sufficient answer to say that the bill charges that an execution issued and was returned "no property found," and the answers of the only parties who are interested in the condemnation of the property admit the return as charged, so that no issue is made by the pleadings, and no question was raised either by Eli or William Robinson, involving an inquiry as to whether the complainants had exhausted their legal remedy.

We think it is quite sufficient that the parties against whom the decree is rendered, and the only parties to be affected by it, distinctly admit the due issue and return of the *fi. fa.*

9. The objection that the execution was not sent to the county

of the defendant's residence, cannot prevail, because it is not shown that the defendant had property in that county on which the writ could have been levied. If the defendant desired to avail himself of such objection, and to turn the complainants round to pursue their legal remedy in the county of his residence, he must show that he has visible property which can be taken in satisfaction in that county.—Brown & Dimmock v. Bates, 10 Ala. 440; Cassidy v. Meacham, 3 Paige 311.

10. The objection that the other creditors of Eli Robinson were not brought before the court, cannot be allowed. It does not appear that there are other judgment creditors, and as we have shown the fund sought to be subjected is unaffected by the proceedings in bankruptcy, the rights of the complainants are the same as in ordinary cases of judgment creditors obtaining a prior right of satisfaction by the use of superior diligence in first obtaining their judgment, and after exhausting their legal remedy being the first to file their bill, by which they acquire a prior lien upon the equitable assets. We think they may well file the bill for themselves alone.—Hendricks v. Robinson, 2 Johns. C. R. 283; Eaton v. Patterson, 2 Stew. & Por. 9; Lucas v. Atwood, ib. 378.

11. The first three exceptions to the master's report were properly overruled by the chancellor. The will of Tod Robinson does not provide *eo nomine*, for the support of Eli and his family; but the property is bequeathed to William, in trust, &c., for the use and benefit of Eli and his family. The interest of Eli being capable of being separated from that of the other *cestuis que trust*, in the profits arising from the employment of the property, as was previously decided, it was not proper to make any allowance for the support of the family, that not being the declared object of the trust. This point, however, is substantially decided by the previous decision.—10 Ala. 702.

12. As to the claim made, for the first time before the master, for the allowance of overseer's wages to Eli, for his services in superintending the business of the trust estate, we think the views of the chancellor entirely correct. Such demand is no where put in issue by the pleadings. Eli, in the account furnished by him in his answer, sets up no claim of the kind, and it does not appear that there was any understanding or agreement between him and the trustee that he should have compen-

sation for his services, other than such as accrued from the possession and control of the property. He voluntarily assumed to act, and cannot make, by such voluntary services performed without request, the trust estate his debtor *nolens volens*.

13. As to the four negroes, Jake, Abel, George and William, which were purchased and to be paid for out of the trust estate, we are of opinion that the record shows no reason why their services may not be taken into the estimate, as the other trust property. They are to be regarded as property subject to the incidents which pertain to the other trust estate, notwithstanding they may not have been paid for, the trust property being bound for their payment. And if the lien which William Robinson has upon them for the purchase money forbids, by its provisions, that the product of their labor should be regarded as a part of the trust estate, this should have been shown by the production of the mortgage.

14. We think it sufficiently appears from the report of the register, that the slaves Parmelia and Andrew were taken into the account as trust property, and the products of their labor, so far as Eli's interest was concerned, subjected to the complainants' demand, and this constituted one of the exceptions taken by the defendants below, and is here assigned for error. We have already shown that these slaves must be regarded as the property of Eli, acquired since his discharge. That William retained the control over the rents, taking the evidence of Tully's indebtedness for it in his own name, as also the mortgage, to prevent its liability to Eli's debts, is not material. He was not bound to give it to Eli, and he could well refuse to perfect the gift as long as he pleased, with the avowed object of preventing Eli's creditors from interfering with it. And so long as it remained imperfect for want of delivery, the creditors could acquire no right to subject it. When the delivery was made, the property in the thing given would vest, and not before, although there was the previously declared intention to give. So that we think the argument that this was a secret parol trust, designed to defraud creditors, is not sustained by the record. Had the request made by the testator of his son William created a trust in favor of Eli, then the argument would apply with much force; but as William had a right to do as he pleased with his own, provided he injured no one, it is not for the creditor to com-

plain that he would not so complete the gift as to render the property liable to the debts of the donee. It is clear we think that he did not complete it until after Eli's discharge. Hence the property is not subject to the complainants' demand. It follows that the court erred in charging the product of the labor of these two slaves as trust property for division. They should not have been taken into the estimate.

We believe that we have now noticed the several errors assigned, and we are unable to perceive any error in the record except that last above referred to. For this, the decree must be reversed, and the cause remanded, that the report of the master may be corrected as to the slaves Andrew and Parmelia. In all other particulars, the decree is correct and must be affirmed. Let Rugely & Harrison pay the cost of this court.

Doe ex dem. CHASTANG *vs.* DILL.

1. When a claimant of lands situated within the Territory of Lousiana has appeared before the commissioner appointed under the authority of the Act of Congress of April 12, 1812, and presented his petition claiming title by grant from the Spanish Government, but produced no written evidence of title, the petition alleging that the same had been lost or carried away by the Spanish authorities, and the commissioner reports favorably to his claim, which is afterwards confirmed by the Act of Congress of May 8, 1822, the title of the claimant is founded upon the report of the commissioner and the Act of Congress confirmatory thereof, and not upon any supposed Spanish grant.
2. When the plaintiff in ejectment proves that the ancestor of his lessors appeared before the United States commissioner and presented his claim to certain lands within the Territory of Louisiana, embracing the lands in controversy, that the commissioner reported favorably to his claim, that it was afterwards confirmed by the Act of Congress of May 8, 1822, and that the register and receiver, under the authoriy of the act, afterwards issued a certificate of confirmation to him, he shows sufficient evidence of a legal title to support the act of ejectment.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

THIS was an action of ejectment, brought by the plaintiffs to recover of the defendant a lot of land in the city of Mobile, situated on the North side of Dauphin street, between Royal street and the river. The plaintiffs, to show title to the *locus in quo*, introduced as evidence the petition of Bazel Chastang, the executor of John Chastang, deceased, addressed to the commissioner of the United States, appointed to ascertain and record claims to land in that part of Louisiana lying east of Pearl river, in which he claimed, in behalf of himself and the other legatees and devisees of said decedent, a lot of land described as follows: "Lying in the town of Mobile, bounded by Rue Royal, that is, Royal street, and the river, and on the upper side of Rue Conception, fronting one hundred and fifty-five feet on Rue Royal and two hundred and eighty feet on Rue Conception." In the petition it is also stated that the petitioner believed the lot had been granted to his father, John Chastang, the testator, but that the written evidence of said grant had been lost or carried away by the Spanish authorities, but that the said testator had had uninterrupted possession of said lot for thirty-two or three years, and therefore prayed that he might be confirmed in his claim to said lot. They also introduced the evidence presented to the commissioner, showing the possession of their father; also his will devising the land to them after the death of his friend and companion, Louisa, to whom he devised the same for life. They further introduced the report of the commissioner upon their claim, which is in the following language: "Report No. 11. Register of claims to lands in the District East of Pearl river, in Louisiana, founded on private conveyances which have passed through the hands of the commandant, but which are founded, as the claimant supposes, on grants lost by time or accident. No. 4. By whom claimed, Bazel Chastang; original claimant, John Chastang; quantity claimed in feet, front 145, depth 281, area 40,745; where situated, Mobile; cultivation and inhabitation, from 1782 to 1813;" also, the remarks of the commissioner upon this and similar claims, which are as follows: "Though the original grants upon which the preceding claims are founded have been lost, yet it is conceived that the claims

to such lots as were inhabited and cultivated under the Spanish government, or such as were built upon by the permission of the Spanish authorities, ought to be confirmed." Signed "William Crawford, commissioner." The plaintiffs also introduced a transcript from the land office at St. Stephens, showing that a certificate had issued to them as for a confirmed claim, under the third section of the act of Congress of the 8th of May, 1822, showing the number of the certificate, the number of the claim, the original and present claimant, and also the quantity confirmed, corresponding in amount with the petition and report of the commissioner; also a transcript from the Register of Locations, from which it appears that a warrant of location had been issued, and the claim ordered to be located so as to not interfere with the claims of Henry Baudain or that of Piere Lucien, and then follows a diagram showing the location of the plaintiff's claim and also those of Henry Baudain and Piere Lucien. There was also parol evidence showing that John Chastang, in the year 1782, was in possession of a lot at the corner of Royal and Conception streets, now called Dauphin street, and had occupied it for many years, and that he and others under him had occupied it until his death in the year 1812. There was a conflict in the testimony as to the extent of the lot, some witnesses testifying that it extended to the river, and was partially covered by the water at high tides, whilst others testified that it was subject only to be reached by the water at extraordinary high tides, and that between the lot and the river, there was a low flat waste, usually wet, and some places covered with stagnant water, but elevated above ordinary high water mark. The witnesses agreed that John Chastang had enclosed the lot with a picket fence, and that the fence extended as far as the lot could be cultivated, but that the fence did not extend to ordinary high water mark, and most of the witnesses said that the lot sued for was not within the lines of said picket fence. It was admitted that the lot sued for was about one hundred and sixty feet from Royal street, on the North side of Dauphin, and within the limits of the claim as presented to the commissioner by Barzella Chastang, and also within the limits of that claim as laid down in the official survey, the form of which is given by an exhibit to the bill of exceptions.

The defendant, in support of his claim, produced in evidence

the third volume of the American State Papers relating to the public lands, and read that portion of the 398th page, relating to the claim of Carman Trazee, being claim No. 2, in the report of the commissioners, the substance of which is, that Carman Trazee claimed under William Plumbly, a lot on the North side of Dauphin street, being seventy-two feet deep by forty feet, and which was inhabited and cultivated from 1813 up to 1819 by the claimant, and those under whom he claimed, which was recommended for confirmation; and also introduced evidence showing that William Plumbly was in possession under a lease from William Pollard, in the fall of 1813 or 1814, and that in the year 1814, he sold portions of the land which he held under Pollard by lease, to various persons, and a portion of the *locus in quo* to one Shaffer, who died, and that Plumbly executed a deed to his widow, who intermarried with Carman Trazee, in whose favor the report of the commissioners above described was made. The defendant also proved that he had acquired by purchase the rights of Carman Trazee. To show an outstanding title in another, the defendant produced a Spanish title to Henry Baudain, his application to the commissioners to have it recognized and confirmed, the report of the commissioners confirming it, its subsequent location and survey, and a patent thereupon issued to the said Baudain, all of which are referred to as part of the bill of exceptions, but are not attached thereto. The plaintiffs then proved that the claimants under the Baudain title had brought suit against the defendant, but had been defeated on the ground of the statute of limitations, and that they had not been in possession of the land since the year 1815, and that the lot had been held by the defendant, and those under whom he claimed, adversely to those claiming under the Baudain title, since that time. Upon this evidence, the court instructed the jury; 1st, that the title of Baudain was not a valid and subsisting title, and need not be regarded by the jury. The court further charged, that the plaintiff's claim was founded on a grant lost by time or accident, and the fact so recognized was conclusive; that by the act of Congress, Carman Trazee was to be entitled to a grant as a donation, and that this act was to be regarded as confirming legal titles to both classes of claimants, and under the act, the plaintiff's title was the best, if his boundaries included the *locus in quo*. The court further instructed

the jury, that the act of Congress confirmed the title of the plaintiffs as it originally stood, and that they were not to regard the confirmation and claim of the plaintiffs as evidence of its limits, but that the plaintiff must satisfy the jury, that the *locus in quo* was within the limits of the old Spanish grant, and if they were not satisfied of this fact, that the plaintiffs could not recover. The plaintiffs excepted to the instructions of the court, except that portion relating to the Baudain title; and a verdict being returned in favor of the defendant, they prosecute a writ of error to this court.

John A. Campbell, for plaintiff in error.

Phillips, *contra :*

The act of 1822, in reference to complete grants, uses the words, "are hereby recognized." In each of the remaining sections the words are "shall be confirmed;" and also the words, "all the grants and confirmations provided to be made, by this act." And the 5th section provides for a survey and location, and also for a decision upon conflicting and interfering claims.—Boatner v. Ventriss, 4 Cond. La. R. 654; Garcia v. Lee, 12 Pet. 512.

It is evident that under this and similar acts, the title is not divested out of the United States until the issue of the patent. —Mayor v. Eslava, 6 Ala. 740; Hallett & Walker v. Hunt, 7 ib. 903; Kennedy v. Townsley, 16 ib. 243; Boatner v. Ventriss, 4 Cond. La. 654; Farmers' Heirs, 11 Ala. 1042; Bagnell v. Broderick, 13 Pet. 448, 450; Wilcox v. Jackson, 13 ib. 516; Public Land Laws, vol. 2, p. 212, 712, opinions and instruction.

It is not denied that Congress may pass a bill by force of an act without a patent. Such was the case.—Strother v. Lucas, 12 Pet. 411; Gregnon v. Astor, 2 How. 344.

The number of feet stated in the abstract presented to Congress, gives no location of the lot, and the act of Congress does not adopt it. It is not conclusive against him, *a fortiori* not conclusive in his favor.—Mayor & Aldermen v. Eslava, 6 Ala. 741; Hallett & Walker v. Hunt, 7 ib. 901; McCay v. Dillon, 4 How. 446; LeBois v. Bramell, ib. 449.

The act of the State authorizes the holder of such a title to maintain an action thereon, and for this purpose considers the

legal title vested. But this would not authorize a recovery when defendant also claims title under the government. It would do no more than oust a trespasser.—Lewis v. Gognette, 3 S. & P. 196; Ryder v. Innerarity, 4 ib. 14.

But as between two incomplete titles derived from the government, it is not competent for the State to declare which one should prevail, or what is their relative dignity. This matter is within the exclusive jurisdiction of Congress.—13 Pet. 450; Wilcox v. Jackson, ib. 506.

The case then shows that by the same act of Congress, the government agreed with the plaintiff and defendant that it would confirm them in their respective claims, and by the terms of that act it reserves to itself the right to survey them, and if found conflicting, to decide between them. A decision by the State court would be a clear usurpation over the government lands.

The plaintiff therefore had no title as against the defendant, and the charge was more favorable to him than the law warrants, and the court will not therefore consider the error assigned.—Farmer's Heirs, 11 Ala. 1049.

The document offered was no survey as required by the act of Congress. It was a mere extract from a map of the city, executed by the surveyor, without any foundation on any act of Congress, and if it had been regarded as a survey, would have shown the plaintiff out of court, as the location of the Baudain title left the party only 140 feet. As to this map, see 2 Pub. Land Laws 841, instruction and opinions.

DARGAN, C. J.—The government of the United States having acquired the territory of Louisiana by the treaty concluded at Paris on the 30th of April, 1803, it became necessary to ascertain the lands which had been granted to individuals in the ceded territory by the different sovereigns, through whose hands it had passed. Until this was done, it could not be known what lands were private property, nor what public domain. To do this, to distinguish the private from the public land, commissioners from time to time were appointed, whose duty it was to examine into all claims presented to them, to make a record of such claims, and report them to the Secretary of the Treasury, together with their opinion as to their validity. It was also made the duty of all claimants to land to present their claims

to the commissioners, to be examined and recorded in the manner and within the time prescribed by the several acts, and the consequence of their neglect was declared to be, that the claim should never afterwards be recognized or confirmed by the United States, nor should any grant, order of survey, deed, conveyance, or other written evidence, which should not be recorded as directed in said acts, ever be considered or admitted as evidence in any court, against a grant derived from the United States. William Crawford was appointed commissioner for the district lying between the Pearl and Perdido rivers, under the authority of the act of the 25th April, 1812, (see Land Laws, vol. 1, 606,) and before him Bazel Chastang appeared and presented his claim, on behalf of himself and the other devisees of John Chastang, his father. It is alleged in his petition that the lot lies in the city of Mobile, bounded by Rue Royal and the river, on the upper side of Rue Conception, now known as Dauphin street, fronting one hundred and fifty-five feet on Rue Royal, and two hundred and eighty-one feet on Rue Conception. It is also stated that the petitioner believed that the lot had been granted to his father, but that the written evidence of said grant had been lost or carried away by the Spanish authorities, and that his father had had uninterrupted possession of the lot for thirty-two or three years. The applicant offered as evidence of his claim, to the commissioner, the will of his father, John Chastang, by which he devised the lot to his "friend and companion, Louisa," during her life, and after her death to the lessors of the plaintiff. He also proved by the depositions of two witnesses, that the testator had possessed and enjoyed the lot, as stated in his petition, but offered no grant or other written evidence, showing title in the testator.

At this stage of the plaintiff's title it may be well to consider what title did the applicant present to the commissioner? What title did he show as against the government of the United States, in the testator, through whose will he claimed? All will at once admit, that he stood at the merey of the government, without any legal title whatever. The possession of the testator, and the idea or possibility that the Spanish authorities may have granted the lot to him, the evidence of which was lost, might very well form a reason or an inducement why the government of the United States should grant a title to the applicant, but such evi-

dence showed no title in the testator that could avail him as against the government, or one deriving title from the United States. The only evidence of title in the testator, if indeed it could be called evidence, was the quiet possesion of the lot for thirty-two or three years. This evidence would avail nothing as against a patentee of the government, or one deriving title from the United States.—Kennedy's Ex'r. v. The Heirs of Townsley, 16 Ala. 239.

The plaintiffs must therefore rely, as in fact they do, upon the report of the commissioner, and the act of Congress of the 8th of May, 1822, confirmatory thereof, as the source of their title; and to the extent that they can show title under this act, they have title without any regard to the boundaries of the supposed Spanish grant. We must therefore look to the commissioner's report, and to the act of Congress confirming it, to ascertain the character and extent of the plaintiffs' title. The commissioner reported the claim as one founded on a private conveyance that had passed through the office of the commandant, but recommended its confirmation on the ground that it had been possessed and cultivated by the testator from the year 1782 until the year 1812. His report gives the dimensions of the lot as described in the petition, but not its boundaries. On the 8th day of May, 1822, Congress passed an act entitled "an act confirming claims to lots in the town of Mobile, and to lands in the former province of Louisiana, which claims have been reported favorably on by the commissioner," the third section of which is in the following language: "That all claims in the town aforesaid, reported as aforesaid, and contained in the reports of the commissioners, and of the register and receiver acting as commissioner, founded on private conveyances which have passed through the office of the commandant, or other evidence, but founded, as the claimant alleges, upon grants lost by time or accident; and which ought, in the opinion of the commissioners, to be confirmed, shall be confirmed in the same manner as if the titles were in existence. *Provided*, that in all such claims, when the quantity claimed is not ascertained, no one claim shall be confirmed for a quantity more than seven thousand two hundred square feet."

The fifth section of the act authorizes the registers and receivers to direct the manner in which all claims to land confirmed

by the act shall be surveyed, and also to decide between all claims interfering or conflicting with each other.

Under the provisions of this act the register and receiver issued to the plaintiffs a certificate of confirmation, and also a warrant of survey, by which the surveyor was directed to locate the plaintiffs' claim so as not to interfere with the claims of Henry Baudain or Piere Lucien. The plaintiffs also introduced a diagram, or plat, of said lot, taken from the map of the city of Mobile, which was approved of by the Surveyor General and deposited in the office of the register and receiver at St. Stephens, which shows that the plaintiffs' lot had a front on Dauphin street of about one hundred and thirty-two feet, but there was no other evidence that the claim was located or surveyed under the authority of the warrant. This is, in substance, the written evidence of the plaintiffs' title, and it is insisted that they failed to show such a title as will support the action of ejectment. We are, however, constrained to hold otherwise. In the case of Hallett v. Eslava, (2 Stewart, 115,) the plaintiff's title was derived under the same act of Congress, and he offered in evidence a certificate of confirmation issued by the register and receiver in pursuance thereof, and the only question was, whether the plaintiff had offered such evidence of legal title as would support the action of ejectment. It was held sufficient under our act of the Legislature, passed in 1812.—Clay's Dig. 341. This decision has never been overruled, but on the contrary, has been affirmed in several subsequent cases.—See 3 Stewart & Por. 105; also Lewis v. Gognette, ib. 180; Ryder v. Innerarity, 4 ib. 14; Eslava v. The Heirs of Farmer, 7 Ala. 543. Under the influence of these decisions we must hold that the title shown by the plaintiffs is such as must prevail at law, unless in the defence a better title was shown by the defendant. We, however, think it unnecessary at this time, to examine the title introduced by the defendant, for, under the instructions of the court, it became unnecessary for the jury to consider of any other fact than this, whether the *locus in quo* was within the limits of the supposed Spanish grant. This instruction evidently made the Spanish Government the source of the plaintiffs' title, and the quantity to which they were entitled to depend upon their old Spanish grant. But it is manifest that they offered no evidence of a written grant from the government of Spain, and

it is equally clear that their only source of title is the act of Congress confirming the commissioner's report, to which we have referred. Nor is it material to inquire, in what manner that act gives title to the plaintiffs, that is, whether it be considered as a statutory grant, or as an acknowledgment on the part of our government that Spain had granted the lot to the ancestor of the plaintiffs, and thus giving them title as it were, by way of estoppel. In whatever mode it may be considered that the plaintiffs acquired title, one thing is certain—they acquired it under the act of 1822, and not from the King of Spain. They therefore have the quantity this act gives them, and no more, without regard to the supposed boundaries of a Spanish grant. We are fully sustained in this view by two recent decisions of the Supreme Court of the United States, to wit, the cases of Menard's Heirs v. Massey, (8 How. 293,) and Bissell v. Penrose, (ib. 317.) We come, therefore, to the conclusion, that the court erred in charging the jury that they must find for the defendant unless they were satisfied that the *locus in quo* was within the limits of the plaintiffs' old Spanish grant. As the questions raised on the defendant's title are not presented in such a manner as requires us now to decide them, we shall postpone their consideration until they are directly presented, and in such a manner as will enable us to pronounce a judgment upon the merits of his defence.

McCRAVEY, Ex'r. *vs.* REMSON.

1. A record is not evidence of any fact which can only be inferred from it by argument.
2. Admissions which have been acted on by others are conclusive against the party making them, in all cases between him and the person whose conduct he has influenced. It is immaterial whether the admission be true or false, whether expressly made or only to be inferred from the conduct of the party, it being the fact that another person has been misled by it, that renders it conclusive.

3. A person claiming title under one who is estopped is also bound by the estoppel, unless it is fraudulent.
4. H., who was the son-in-law of the plaintiff's testator, had possession of the slave in controversy at the time of the testator's death, under a parol gift to his wife. The plaintiff as executor demanded the slave, to be appraised as part of his testator's estate, and H. delivered her up, admitting that she belonged to the estate. The slave was inventoried and appraised, and H. afterwards hired her from the plaintiff and executed his note for the hire. While thus in possession of the slave H. sold her to F, who sold her to R., against whom the executor brought detinue to recover her. To prove that the slave had been charged to him as the property of the estate, the plaintiff offered a transcript of a suit in chancery previously instituted by himself for a final settlement of the estate. *It was held*,
1. That the record was inadmissible for that purpose, unless offered in connection with other proof. The fact which it sought to establish can only be collected from the transcript, if at all, by inference from the character and objects of the suit.
2. That H. is estopped, as against the executor, from setting up title to the slave under parol gift from the testator.
3. That the defendant claiming under H. is also bound by the estoppel, unless it is fraudulent.

ERROR to the Circuit Court of Talladega. Tried before the Hon. John J. Woodward.

THIS was an action of detinue instituted by the plaintiff in error, as executor of Kinchen Carr, deceased, against Remson, for the recovery of a negro girl named Lucinda. The plaintiff produced a certified copy of the last will and testament of said Carr, which was duly admitted to probate in Habersham county, Georgia. By said will, said testator bequeathed said negro to Joel Hunt, in trust for his wife Catharine, who was testator's daughter, during her natural life, and after her death to the heirs of her body. It was proved at the trial, that Hunt had possession of the negro, at the time of testator's death, and several years previously, under a parol gift from him to Hunt's wife; that he delivered her to the executor, on his demanding her, to be appraised as part of the estate, and admitted that she was a part of the estate; that she was inventoried and appraised accordingly, and remained in the possession, and under the control of the executor, for more than a year afterwards; that Hunt hired her from the executor, and gave his note for the hire,

and while thus in his possession, sold her to one Finley, who brought her to Alabama, and sold her to defendant.

The plaintiff offered in evidence a transcript of a suit in Chancery in Georgia, instituted by himself as executor of Carr for a final settlement of his testator's estate. The transcript was offered, in the language of the bill of exceptions, "for the purpose of showing that said estate had been declared insolvent, and to show the amount of negroes which had been charged against the plaintiff as executor." The transcript was excluded by the court, to which the plaintiff excepted.

The court charged the jury in substance; first, that although Hunt had delivered up the said negro to the executor, on his demanding her, to be appraised as a part of Carr's estate, and she was appraised accordingly, with the knowledge and consent of Hunt, and afterwards hired by him from the executor, yet if they believed that Hunt had a perfect title by parol gift from the testator, to his daughter Catharine, and acted under a mistake as to his right to the property, the plaintiff could not recover; and secondly, that although Hunt's title to the negro might be perfect by parol gift, yet he might waive it, and claim under the will only, but if they believed that he did thus waive his original right, and consent to hold under the will, still the plaintiff could not recover if they believed that the defendant was a *bona fide* purchaser for a valuable consideration without notice of such waiver. The plaintiff excepted to the exclusion of the transcript, and to the charges given, and now assigns them as error.

White & Parsons, for plaintiff in error:

1. The delivery of this slave by Hunt, under whom the defendant claims, to the plaintiff, as the property of his testator, for appraisement, was a deliberate act, done with a full knowledge of all the facts in relation to his own rights, or those of his wife Catharine; for the record shows that when the plaintiff called on him to deliver all the property belonging to Carr in his possession, he brought forward the slave sued for, and some other articles, but refused to surrender others, saying "Carr had given them to his wife Catharine." The mistake then, if any, was not as to the facts, but as to the law, and this will not avail him. Moreover, the plaintiff used no artifice or persua-

sion, but simply discharged his duty as executor in good faith by demanding the surrender of such property as belonged to Carr's estate in his possession.—See Haden v. Ware, 15 Ala. 159; also, Champlin v. Laytin, 18 Wend. 410, and the cases cited in the opinion of the court.

2. The promissory note given for the hire not only acknowledges, by the act of hiring, the paramount title of the plaintiff, but it contains an express stipulation "to return said slave at any and all times." Here is another deliberate act, recognizing the title of the plaintiff as executor of Carr's estate to this slave. It is manifest "under these circumstances, he cannot be allowed afterwards to dispute that title on grounds with which he was well acquainted, when he made the admission."—See Gosling v. Birnie, 7 Bingham, 156, in C. L. R. vol. 20; Keiner v. Saunders, 6 Adolph. & Ellis, 515, vol. 33; Story on Bailments, 293; ib. Agency; McNeill v. Phillips, 1 McCord, 392; Manning v. Norwood, 2 Const. R. S. C. 413; Harris v. Watson, 2 B. & C. 540; Stephens v. Pain, 9 Cow. 274; Jackson v. Spear, 7 Wend. 401; Phillips & Brown, v. Hall, 8 Wend. 610; Osgood v. Dewey, 13 Johns 240; Stonard v. Duncan, 2 Camp. 344; Comyn's Dig. tit. Estop. [193] A. & B.; Bean v. Welsh, 17 Ala. R. 770; Winston v. Weathersby, 1 Nott & McCord, 373, and cases cited.

3. The facts and circumstances show sufficient to put a man of ordinary prudence upon inquiry; and if he disregarded them, he must sustain the loss; "because the vendor of a chattel, although in actual possession, can convey only such title as he has, and cannot by his sale divest the title of another, who neither assents to, nor recognizes his act."—See Lyde v. Taylor, 17 Ala. 274; Williams v. Marle, 11 Wend. 80; Everett v. Coffin, 6 ib. 609; Wheelwright v. Depeyster, 1 Johns. 470; Walker v. Miller, 11 Ala. 1082. "And when he holds them in a fiduciary capacity, with no express or implied right obtained from the owner to sell, or otherwise dispose of them, as where he is a bailee, or trustee, he cannot make a valid sale of them, so as to divest the actual owner of his right to reclaim them from any person, although such person may have bought them *bona fide*."—Story's Sales, §§ 201-188, and Hilliard on Sales, p. 24-25; Parsons v. Webb, 8 Greenl. 38.

4. It is further contended, that in delivering the slave to

plaintiff, as the property of Carr's estate, thereby inducing him to include her in his inventory and appraisement, at the valuation of four hundred dollars, the defendant Hunt is estopped to deny the plaintiff's right to the slave, because the inventory and return are at least *prima facie* evidence against him in a final settlement of the estate; and to overturn it, he must show that Carr had made a valid gift to Hunt. The evidence, to say the least, is conflicting on this point, and it is doubtful how a jury would find on that question. Is not this a burthen cast upon the plaintiff by the voluntary and deliberate act of Hunt, the consequences of which should rest on him, rather than on the plaintiff? Indeed, in some States, the inventory is held conclusive, because it is his own act.—See Wright v. Wright, 2 McCord Chan. R. 196. In Georgia, it is at least *prima facie* evidence against him, which he must overturn by proof.—See the Justice's Inferior Court, v. McLaren, 1 Kelly, 291. Such is the rule in this court by repeated decisions; and it has been held in a case, where the facts are strikingly analogous to this, "that the party was estopped from setting up his claim."—See Pool v. Harrison, (at the last June term, 1850,) and same case in 16 Ala. 175.

Rice & Morgan, for defendant in error:

1. The transcript was properly excluded by the court, because—1. It was only offered "for the purpose of showing that the estate had been duly declared insolvent, and also to show the amount of negro slaves which had been charged against him." This is an admission that it was inadmissible for all other purposes; and it is not error to exclude it, if inadmissible for the purposes specified.—Creagh v. Savage, 9 Ala. 959. No other proof was offered in connection with it, and the transcript of itself does not show the facts which it was offered to prove.—Spears v. Cross, 7 Port. 437; Bell v. Rhea, 1 Ala. 83; Sessions v. Reynolds, 7 Smedes & M. 156. 2. When legal evidence is offered in connection with illegal evidence as a whole, the court is not bound to separate them, but may reject the whole.—Smith v. Zaner, 4 Ala. 99; Melton v. Troutman, 15 ib. 537; Moore v. Leftwich, 1 S. & P. 254. 3. A bill in chancery is not evidence for the party filing it.—Cawsey v. Driver, 13 Ala. 818; Jones v. Kolisenski, 11 ib. 607; St. John v. O'Connell, 7 Porter, 466; McClelland v. Ridgeway, 12 Ala. 482.

2. Hunt is not estopped from setting up his title to the slave. The appraisement and hiring do not amount to an estoppel, if Hunt acted under a mistake as to his right to the slave.—Hurd v. Cushing, 7 Pick. 169; Jones v. Sasser, 1 Dev. & Bat. 452; Johns v. Church, 12 Pick. 557; Loomis v. Green, 7 Greenl. R. 386; Morse v. Child, 6 N. Hamp. 521; Spence v. Mitchell, 9 Ala. 748; Hunley v. Hunley, 15 ib. 92; Carter v. Darley, 15 ib. 698; Shelton v. Carroll, 16 ib. 148; Edmondson v. Montague, 14 ib. 377. Estoppels are not favored in law, and he who claims by estoppel must prove it clearly. If the doctrine of estoppel applies at all, McCravey should be plaintiff in his individual character, and not as executor of Carr.

3. If H int is not estopped, *a fortiori* Remson is not, being a *bona fide* purchaser for a valuable consideration, without notice of Hunt's conduct, or the plaintiff's claim.—Gamble v. Gamble, 11 Ala. 966; Stewart v. Conner, 13 ib. 94; Wallis v. Long, 16 ib. 738; Spence v. Mitchell, 9 ib. 744.

PARSONS, J.—The record of the suit in Chancery, in Georgia, was offered as evidence of the insolvency of the estate of plaintiff's testator, and to show the number, value, &c. of the slaves charged to the plaintiff as executor. The insolvency of the estate is clearly shown by the transcript, and it is competent evidence of this fact; but we cannot see the relevancy or materiality of this fact, in this suit, for the plaintiff's rights are the same, whether the estate is solvent or insolvent. Hence the plaintiff was not injured by the exclusion of the transcript when offered for this purpose.

If the transcript had been offered in connection with other evidence, it would probably be admissible, as showing that the slave sued for had been charged to the plaintiff, as the property of the testator. But if this fact can be collected from the transcript alone, it is only by inference from the character and objects of the suit. Lord Chief Justice De Grey, in his celebrated opinion in the Duchess of Kingston's case, which has since been followed as a just exposition of the law upon this subject, holds, "that neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter to be inferred by argument from the judgment."—2 Phillips on Evidence, 4. Taking this to be the law, the transcript was properly excluded by the court below.

But in the charge first given, we think the Circuit Court mistook the law. It is well settled that admissions which have been acted on by others are conclusive against the party making them, in all cases between him and the person whose conduct he has influenced. Nor is it material whether the admission is expressly made, or is to be inferred from the conduct of a party. And in the operation of this rule, it is unimportant whether the admission is true or false, made fraudulently or innocently, it being the fact of another's having acted on it, that renders it conclusive. In Dezell v. Odell, 3 Hill, 215, a constable had seized goods by virtue of execution, which were delivered to a third person, on his giving a receipt to re-deliver them on a certain day; when the day arrived, the receiptor refused to re-deliver them, claiming that the goods at the time of the levy and receipt were his own, and the court held, that in an action brought by the constable, to recover the goods, the receiptor was estopped from setting up title in himself, Cowen, J. in delivering the opinion of the court, saying, "Had the defendant's claim been interposed at the time of the levy, and he had signed the receipt in terms without prejudice to his right, the question would have been open. The creditor would thus have been put upon his guard, and enabled to seek for other property on finding that his debtor had no title to that in question. Indeed, here was a cause of action on the part of the receiptor, directly calculated to influence the conduct of the creditor in a way prejudicial to his interests, unless we hold the receiptor. The officer being induced to part with the possession, or to forbear taking actual possession, by the receiptor recognizing his right, and agreeing to take or hold for him, was itself an injury, if we now let the defendant go free. We then have a clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This is the very definition of an estoppel *in pais*. For the prevention of fraud, the law holds the admission to be conclusive."

In Gosling v. Birnie, 20 Eng. Com. Law R. 153, a defendant, who was a wharfinger, agreed to hold certain timber for the plaintiff, who purchased of one Ross. There was evidence

showing that Ross had previously sold the timber to one Allum, of which the defendant had notice. Some time after the defendant agreed to hold the timber for the plaintiff, he presented a bill for wharfage due upon it, saying to the plaintiff, "These are the only charges on your timber." Afterwards refusing on demand to deliver the timber to the plaintiff, an action of trover was instituted to recover damages for its conversion. The defendant rested his defence upon the ground, that the timber was not the plaintiff's property, but the property of Allum. The court held that the defendant was estopped by his own admissions from denying that the plaintiff had title to the timber. "For," says Lord C. J. Tindal, "unless they amount to an estoppel, the word estoppel may as well be blotted out from the law." In the cases cited, as in this case, the plaintiffs had acted on the admissions of the defendants, and had placed themselves in a position different from that occupied by them before the admissions were made. So in this case, acting on the admissions of Hunt, the plaintiff inventoried the slave sued for, as the property of the estate of his testator; and by so doing, rendered himself *prima facie* liable to those interested in the estate, for the value of the slave. And it does not appear that he has been discharged from this liability. It is clear from the authorities cited, that Hunt is estopped under this state of facts, from contradicting his admissions, or setting up in himself a title to the slave, which existed within his knowledge, previously to the surrender to the executor.

It is, however, insisted that although Hunt is estopped from setting up a title to the slave, existing previously to the surrender to the plaintiff as executor, yet the defendant is not, being a *bona fide* purchaser, without notice of the plaintiff's rights. We think that a person claiming title under one who is estopped, will also be bound by the estoppel, unless the estoppel is fraudulent.—Sikes v. Basnight, 2 Dev. & Bat. 151; Phelps v. Blount, 1 Dev. 177.

The result is, that the judgment must be reversed, and the cause remanded.

GOULD *vs.* HAYES, *et al.*

1. When two courts have concurrent jurisdiction, that which first takes cognizance of a cause has a right to retain it, to the exclusion of the other.
2. The original jurisdiction of the Court of Chancery is not affected by the statutory jurisdiction conferred upon the Orphans' Court, over the settlement of estates, except when prohibitory or restrictive words are used denying to the Court of Chancery the exercise or continuance of its jurisdiction.
3. The Court of Chancery may take cognizance of the settlement of an executor's administration after it has been commenced in the Orphans' Court, when there are complicated matters of account to be settled, and trusts to be executed, which the Orphans' Court cannot enforce.
4. When suit has been commenced prior to the passage of the act of 1846, by the distributees of an estate against the executor after his removal from office, for an account of the assets that have come to his hands and the waste committed by him, the subsequent passage of that act cannot operate retrospectively to defeat the suit if properly commenced.
5. Prior to the act of 1846 a suit might be maintained by the distributees of an estate against the executor after his removal from office, to make him account for the assets that had come to his hands.
6. A testator by will directed that his estate should be kept together until his eldest son arrived at the age of twenty-one, and that the profits derived therefrom, after paying the expenses of his plantations, &c., together with all moneys accruing to his estate from other sources, should be invested in bank stock to constitute a permanent fund, of which the interest or dividends should be equally divided among his children. After the removal of the executor from office, the distributees filed a bill against him, charging him with waste, negligence, &c., and praying an account and settlement of his administration. *It was held*,
   1. That the complainants occupied the position of residuary legatees, and must bring before the court all persons interested in the fund which they sought to appropriate.
   2. That the administrator *de bonis non* was a necessary party defendant, and that the bill should show that no claim of his was set up, or, if set up, that it constituted no charge upon the fund sought to be condemned which should intervene between the complainants and an absolute appropriation of the fund to their benefit.

3. That the creditors, if any, should be brought in before the master in taking the account, as in case of a creditor's bill.
4. That advantage might be taken on *general demurrer* of the want of proper parties.

7. The omission of an indispensable party is an error for which a decree may be reversed, although the objection is taken for the first time in the Appellate Court.
8. Reasonable compensation will not be refused to executors and administrators, except in cases of wilful default or gross negligence, by which loss to the estate has been occasioned.
9. When a testator directs his estate to be kept together for distribution at a future period, the executor, if his conduct entitles him to any compensation, *has a right to insist upon annual compensation*, under the act of 1841, (Clay's Digest, 228 § 39,) instead of commissions on the amount of receipts and disbursements; and in ascertaining that compensation regard must be had "to the amount of labor performed, the responsibility involved, and the value of the estate."
10. But for services performed previously to the passage of the act of 1841, an executor's compensation must be determined by the then existing law.
11. The mere failure to make annual returns will not deprive an executor of his right to compensation, when he has not been guilty of any gross neglect of duty.

ERROR to the Chancery Court of Greene. Tried before the Hon. W. W. Mason.

THE bill in this case was filed by the children of George Hayes, deceased, against William P. Gould, his executor, after his removal from office. The bill charges the executor with waste, negligence, &c., and prays an account of the assets that have come to his hands. The bill was filed in May, 1845, and the executor had previously filed his accounts and vouchers for final settlement in the Orphans' Court. The will of the testator directed that his debts should first be paid; that his executor should have power to dispose of all his lands lying out of this State; that his children should receive a liberal education; that his negroes should be divided among his three children, his eldest son to receive his share on arriving at twenty-one, and the other shares to continue under the control and management of his executors until his two daughters should respectively arrive at that age. The fourteenth and fifteenth clauses of the will are as follows, viz:

"14. My plantations and hands are to be managed as they now are until my executors shall deem it expedient and proper to cause others to be opened."

"15. All the surplus proceeds, after the maintenance and support of these plantations, together with all moneys arising from the sale of lands, or accruing to the estate from any other sources, except what is already disposed of, shall be vested in the safest bank stock, which is to be a permanent fund, the interest or dividends to be equally divided among my three children."

THORNTON & HALE, for plaintiff in error:

The assignments of error in this cause raise two questions, one in relation to the equities of the bill and the propriety of pronouncing a decree in favor of the complainants under the facts disclosed in the record, and the other in relation to the compensation of the executor.

These complainants are not the proper parties to this bill, the object being to compel Gould, the out-going executor, to account for the funds of the estate in his hands as executor, and no decree could properly be rendered in their favor for such funds under the facts disclosed in the record.

1. Because the estate was still owing a large amount of debts, and the assets of the estate were first bound for the payment of debts before the distributees can ask that any thing be set apart for them.—5 Ala. 14.

2. Under the provisions of their father's will the estate is to be kept together under the charge of the executor, until Charles Hayes, one of the complainants, arrives at the age of twenty-one years, and that time has not yet arrived, and until that time does arrive, they are only entitled to a maintenance out of the profits; and the court has no power to defeat the will of the testator by decreeing to the distributees the very fund that he has devoted to the payment of his debts, or directed his executor to invest.—8 Por. 296; 8 Ala. 464.

It is true they have an ultimate interest in the proper application of whatever funds may be in his hands, for they are entitled at a future time to whatever may remain after the payment of the debts of the estate; but that does not authorize them to invoke the aid of a court of chancery unless they can show collu-

sion between Gould and Leachman, the adm'r. *de bonis non*, or that by reason of the insolvency of Gould and his securities, (of which there is no pretence, and it is not charged in the bill,) they are likely to sustain irreparable injury.—5 Ala. 523.

We insist that Leachman is a necessary party to this bill. Now this is not the case simply of an administrator *de bonis non* succeeding an out-going administrator in chief, but Leachman, when appointed administrator *de bonis non*, with the will annexed, succeeded to all the executorial rights and duties created by the will, (4 Ala. 683, and cases there cited,) and was bound to pay the debts of the testator left unpaid by his predecessor, and execute the other trusts of the will; and we have seen that whatever assets of the estate derived from crops and other sources were in the hands of Gould were devoted, by the provisions of the will of the testator, first to the payment of his debts: Leachman then had a clear right to these funds for the purpose of carrying out this trust under the will, and having the right, would not a court of equity afford him or any creditor of the estate of Hayes the necessary remedy to obtain them?

However this might be upon general principles of equity, the statutes of 1806 and 1821 expressly give the administrator *de bonis non* the action of account against the out-going representative, when removed for any of the causes specified in the statute. (Clay's Dig. 221, § ,) and Gould was removed for one of the very causes specified in the act. These two statutes being upon the same subject matter, are to be construed in *pari materia*, and their effect, to the extent for which we contend, is recognized in 2 Por. 588, and 6 Ala. 39; and, in all cases where actions of account may be brought, a court of chancery has concurrent jurisdiction with the courts of law, and especially when actions of account are given by statute.—2 Marsh. 338; 1 J. J. Marsh. 182; 5 Pet. 495; 9 Johns. 470.

Then, as Leachman is entitled to the funds, and has a clear remedy for obtaining them, he is surely the proper party to sue, and not permit the infants to recover from Gould a fund to which they are not entitled, and then Leachman or some creditor to file a bill and recover the same fund from them in order to appropriate it to the payment of the debts of the estate, as provided by the will of the testator. Courts of chancery hate a multiplicity of suits.

But there is another view of this case that shews the necessity that Leachman should be a party to these proceedings for a settlement of Gould's account. If upon the final settlement of the accounts it should turn out that the estate was indebted to Gould, he would be entitled to a decree over for the amount due him.—1 Story Eq. § 522; 1 Wash. Va. R. 134. That decree ought not to go against the infants and subject the land that has descended, but against Leachman, for he has the personal property of the estate in his hands, which is first liable to pay the debts.

But waiving the question of parties, we insist that under the facts disclosed in the record the bill should have been dismissed at the hearing.

A Court of Chancery, in the matter of the administration of estates, has a concurrent jurisdiction with the Orphans' Court, and not an exclusive jurisdiction, and the rule is, that whichever of two concurrent jurisdictions first possesses itself of a cause, has a right to proceed and settle it.—9 Ala. 479; 4 Johns. Ch. R. 409; 7 Paige 68; 2 Stew. 15; 15 Ala. 269; 16 Mass. 171; 1 Hawks 78. And there is no matter with which Gould was chargeable, as shown upon the hearing, which the Orphans' Court was not competent to settle, (9 Por. 648; 2 ib. 328,) and under the act of 1839, he was chargeable with the rent of land as assets.—Clay's Dig. 199.

When the special matters charged in a bill giving a court of chancery jurisdiction are denied by the answer and fail upon the proof, the bill should be dismissed.—3 Lit. 378; 4 Bibb 184; 7 Cranch, 69; Smedes' Dig. 128, § 178.

In this case all the special matters charged in the bill, such as waste of the realty, conversion, embezzlement, or mal-administration of the personalty, are denied in the answer and not sustained by the proof.

2. Whatever may have been the rule as to compensation in England or elsewhere, it is the settled law of this State that reasonable compensation is never refused, except in cases of wilful default, or gross negligence, whereby injury accrues to the estate.—10 Ala. 914. And the executor having kept the estate together under the provisions of the will of his testator, is entitled to a reasonable annual compensation for his labor, care and responsibility in the management of the estate, (Clay's Dig.

228, § 39) and that it is imperative upon the court to give this specific annual compensation under a fair construction of the statute.—*Ex parte* Simonton, 9 Porter 383; 5 Johns. Ch. 113; 17 Ala. 527, and cases there cited.

But the commissions allowed are not sufficient in amount to compensate the executor even in the case of an ordinary administration.—10 Ala. 966. The ordinary duties of an administrator are, to sell the property, collect the assets, pay the debts and distribute the estate; but here there are extraordinary duties imposed by the will, and therefore additional compensation should have been allowed.—9 Ala. 900; 5 Monroe 65. Compensation for time and trouble shall be allowed.—5 Ala. 315; 9 Por. 667.

It should have been referred to the register and master to fix and allow a reasonable compensation, as the law has fixed no standard upon this subject.—1 Dev. & Bat. Eq. 491; 1 P. Wms. 142; 9 Ala. 900.

Clark & Campbell, *contra*:

1. A court of chancery has concurrent jurisdiction with the Orphans' Court to call executors and administrators to account. 2 Williams on Ex'rs. 1437, (ed. of 1841;) 3 Dana 18; 2 J. J. Marsh. 198; 3 Bibb 456; 6 Ohio 429; 1 Har. & J. 151; 2 Gill & J. 14; 3 Munf. 83; Clay's Dig. 226, § 29.

And although the court of chancery, in an ordinary administration, might not be willing to encourage the exercise of this jurisdiction, still it has no power in the absence of a legislative restriction to refuse, (1 Story Eq. Juris. § 542,) and this court has, under its former and present organization, from time to time recognized this jurisdiction.—Gayle v. Singleton, 1 Stewart 566; Cherry v. Belcher, 5 S. & P. 133; Dobbs v. Cockerham, 2 Por. 328; Levens v. Butler & Wife, 8 ib. 380, 400; Dement v. Adm'r. of Boggess, 13 Ala. 140; Scott v. Abercrombie, 14 ib. 270; King & Ansley v. Smith & Steele, 15 ib. 264.

And the circumstance that the removed executor had filed his accounts in the Orphans' Court for an annual or even a final settlement, and a day set for that settlement, is not sufficient to oust the court of chancery of the exercise of its jurisdiction.—King & Ansley v. Smith & Steele, 15 Ala. 264; Blakey's

Adm'r. v. Blakey's Heirs, 9 ib. 394; Levens v. Butler & Wife, 8 Por. 397-8-9; Cherry, &c. v. Belcher, 5 S. & P. 133.

And this is more especially the case where infants are the legatees.—1 Story's Equity Juris. § 600; 2 Williams on Ex'rs. 1484, (ed. of '41.)

But the bill is not only for an account of the administration of the assets of the testator in the payment of the debts, but for an account of the manner in which the trusts of the will have been executed. The most of the duties of the executor are in execution of express trusts. The crop made the year of the death of the testator and the debts due to him at his death, are expressly set apart in the will for the payment of debts, but the subsequent crops are not; they are directed to be invested in bank stock, and the dividends to be paid to the complainants. The will also provides how complainants shall be supported and educated, and out of what funds. The complainants are therefore the beneficiaries under the will, and the executor, Gould, their trustee, and as such, liable to account to them, and no other, in a court of chancery, and no where else. As to the profits of the plantation, and how invested or applied, the Orphans' Court had no jurisdiction.—2 Lomax on Ex'rs. 527; 2 Williams on Exr's. 1485, (ed. of '41;) 1 Story Eq. Juris. § 600; Portis v. Creagh's Exr's., 4 Porter 332; Levens v. Butler & Wife, 8 ib. 399; Harrison v. Harrison, 9 Ala. 478; Billingslea, &c. v. Harris, &c. Exr's. 17 ib. 214.

Besides this, the bill shows that although the executor had the control, under the will, of certain lands for the purpose of carrying on the plantations, there were certain other farms or plantations left entirely undisposed of. These lands vested in the complainants as the heirs at law of the testator, and were rented out by the executor, and the account shows the sum of about $1400 actually received by him therefrom. These lands not passing by the will, the rents belonged to the complainants, unless they were made assets by the act of 1839, (Clay's Dig. 199, § 36,) which we do not believe they were, and if they belonged to complainants, the executor, Gould, by taking control of said lands and receiving the rents, became a trustee for the complainants, and liable to account in chancery, and not in the Orphans' Court, therefor. These lands were not rented out at public outcry, as directed by the statute. Could the rents,

therefore, become assets of the testator?—1 Rice's Eq. R. 198; Terry v. Ferguson, Adm'r., 8 Por. 500; Levens v. Butler & Wife, ib. 380; Smith's Heirs v. Smith's Adm'r., 13 Ala. 329.

The power under the will to sell any of the lands, if carried out, is the execution of a trust, and the executor could only be called to account as such trustee.—See the case of Conklin v. Egerton's Adm'r., 2 Wend. 430.

The title to the real and personal estate, on the death of the testator, vested in the complainants, and the enjoyment of the property could not be withheld from them even by the administrator *de bonis non*.—Heirs of Capell v. McMillan, 8 Por. 197.

The complainants were the proper parties to exhibit the bill. —Clay's Dig. 226, § 29. The administrator *de bonis non* had no interest, and the statute of 1806, (Clay's Dig. 221, § 4,) did not alter the general rule, that no one should be made a party who has no interest.—Story's Eq. Pl. § 231; Kerr, &c. v. Watts, 6 Wheat. 550. And if the administrator *de bonis non* had exhibited the bill alone, or in conjunction with the complainants, it would have been demurrable. This bill was filed before the passage of the act of 4th February, 1846.—Session Acts 1845-6, p. 13; King & Ansley v. Smith & Steele, 15 Ala. 264; Upchurch v. Norsworthy, 12 ib. 533; Nolly v. Wilkins, Ad'm. *de bonis non*, 11 Ala. 872; Willis v. Willis' Ad'm. 9 ib. 721; Moore v. Armstrong, 9 Por. 697; Bowie v. Minter, 2 Ala. 406; Swinks, Ad'm. v. Snodgrass, 17 ib. 653; Chamberlain v. Bates, 2 Por. 550; Prosser v. Yerby's Ex'r. 1 How. (Miss.) 93; Cheatham v. Bufort, 9 Leigh, 580.

The statute of 1806 (Clay's Dig. 221, § 4) did not enlarge the powers of an administrator *de bonis non*. The right of action is only for such goods and chattels as came to the possession of the former administrator. It did not extend to money, the proceeds of property properly administered upon. Such proceeds are trust effects in the hands of the executor or administrator who disposed of such property.—1 How. (Miss.) 93; Clay's Dig. 222, § 6.

It was only by the act of 1843, that even in case of insolvent estates, the administrator *de bonis non* could recover the proceeds of effects administered on by a former administrator or executor.—Chamberlain v. Bates, 2 Por. 550. The act of 1846 clearly shows that no decree could have been rendered in the Or-

phans' Court before the passage of that act, (Clay's Dig. 304-5 § 42 *et seq.*,) showing that the decree rendered by the Orphans' Court must be in the names of the respective distributees.—Nolly v. Wilkins, Adm'r. &c., 11 Ala. 872.

Independent of the statute, the administrator *de bonis non* could have maintained an action against his predecessor for any of the goods and chattels of the testator which remained in specie unconverted, and the complainants could not have been parties thereto. The statute is therefore but declaratory of the existing law.

The existence of debts would not authorize a suit by the administrator *de bonis non*. The court, if necessary, would administer the assets for creditors.—Gillespie v. Alexander, 3 Russell 130; 3 Cond. Eng. Ch. R. 326; Thompson v. Brown, 4 J. C. R. 619; 2 Iredell's Eq. R. 489.

The court can apply the funds to the payment of debts if needed therefor, and this application is to be made on petition of the creditors.—Gillespie v. Alexander, 3 Russell 130. The removed executor has nothing to do with its application, if he has delivered over the unadministered effects to his successor.

The case made by the bill and proofs shows that the court of chancery had jurisdiction, and that it had power to render the decree in favor of the complainants.

2. As to compensation. It is a rule in equity that a trustee is never permitted to make any profit to himself in any of the concerns of the trust.—Brown v. Rickets, 4 J. C. R. 305. On the other hand he is not liable for any loss which occurs in the discharge of his duties, unless he has been guilty of negligence, malversation or fraud.—1 Story's Eq. Juris. §465. It is the duty of a trustee to do all acts which are necessary and proper for the execution of the trust he has undertaken.—Harrison, &c. v. Mock, &c. 10 Ala. 193; 2 Story's Equity Juris. 1268.

But when he proves himself faithless and neglectful, he is not entitled to any compensation.—Story on Agency, § 331-2.

It was one of his duties as a trustee to render accounts annually. These accounts are not intended for his own benefit, but for the benefit of the *cestuis que trust*. He, however, never rendered any until after he was removed from the trust, and then in such a confused state that no opinion could be formed of the profits of any one year.—Clay's Dig. 198, 267, 582; Wright v. Wright, 2 McCord's Chan. R. 195.

Compensation is allowed to a trustee for time and trouble in the performance of all acts which are necessary and proper for the due execution of the trust.—10 Ala. 193. Is there any of that management which a prudent man would execise in regard to his own estate? This is the test.

But in addition to this the complainants were taxed with all the costs of this suit, when they were the successful party and ought to have had their costs, or at most each party ought to have paid their own costs; because, if on the part of the complainants some of their charges in the bill were not sustained, the defendant himself, when he came before the master, abandoned nearly $3000 that he had previously claimed as entitled to retain of annual salaries.—Dan. Ch. Pr. 1520, (note 1;) Hopkins' Ch. R. 344; 2 J. J. Marsh. 444; Cullingsworth v. Loyd, 2 Beav. 394; 17 Eng. Ch. R.; Spencer v. Spencer, 11 Paige, 299; U. S. Dig. for '48, p. 150, § 716.

But it is contended that by the act of 1841, (Clay's Digest, 228, § 39,) that where, by the directions of the will of the testator, an estate is kept together, that it becomes imperative upon the Judge of the County Court to make an annual allowance to the executor for his attention and services. The general rule of construction is, no doubt, as laid down in Tarver v. Commissioners' Court of Tallapoosa, (17 Ala. 531-2,) that where the words "it shall be lawful" are used in the statute, they are peremptory, where the public or an individual has a right *de jure* that the powers conferred by the act should be exercised.—9 Por. 392; Bacon's Ab. 239; 5 J. C. R. 112; 1 Pet. 64. But none of the cases cited, or which could be cited, enables us to say that a discretion was not intended by the Legislature to be exercised by the judge of the County Court. The statute is not that the judge shall allow an annual compensation in lieu of commissions, but only that if disposed so to do, he shall have full power to that effect.

The amount and form of the allowance to the executor was clearly one of discretion.—Phillips, Adm'r. v. Thompson & Wife, 9 Por. 664; Harris v. Martin, 9 Ala. 895; Magee v. Cowperthwaite, 10 Ala. 966.

An appellate court will not ordinarily revise a decision as to the *quantum* of allowance. Such is the rule on appeals in Admiralty in cases of salvage.—1 Gallison, 133; 10 Peters 108.

And courts of chancery and courts of appeal from their decisions are governed by the same principle.—2 Dev. & Bat. Eq. R. 400; Peyton v. Smith, ib. 325, 348; Brewer v. Vanarsdale, 6 Dana 204; Bennett's Ch. P. 100, 147-8.

If, upon a review of the whole case, this court should be of opinion that the plaintiff in error ought to have had an annual salary, instead of commissions on the money, still if the commissions allowed were equal to what the court believes the annual salaries ought to amount to, it will not reverse.

CHILTON, J.—This is a suit by the children of George Hayes, deceased, calling upon Gould, the late executor of their father's will, to account for the real and personal estate which came to his hands or under his control, and charging him with gross negligence in its management, as well as multiplied acts of malfeasance and waste in regard to it.

The case has been elaborately and very ably argued by the counsel on both sides, and we proceed briefly to announce our conclusions, attained after a careful examination of the unusually large record. Although very many points have been argued, yet we think they are collateral to three leading inquiries, to which we propose confining what we have to say. These are, first, does the bill contain allegations sufficient to make this a case proper for equitable relief? second: conceding that it does, is the proof of those allegations sufficient to justify a decree? and third, whether, if the executor is entitled to any compensation, he should have an annual allowance made to him, instead of commissions upon the amounts collected and disbursed by him.

1. And first, as to the case made by the bill. It is objected that the jurisdiction of the chancery court cannot be maintained, because the Orphans' Court, having concurrent jurisdiction, and being in possession of the cause when this bill was filed, had the right to retain and proceed with said cause to a final settlement. The law is too well settled to be questioned, that where two courts have concurrent jurisdiction, that which first takes cognizance of the cause has the right to retain it to the exclusion of the other. —4 Burns Ecc. L. 266; Harrison v. Harrison et al. 9 Ala. 479; Stearns v. Stearns, 16 Mass. 171; Flournoy's Ex'r. v. Holcomb, 2 Mun. R. 34; King & Ansley v. Smith & Steele,

15 Ala. 269, and cases cited; Nelson & Hatch v. Dunn et al. ib. 514; 9 Wheat. 532. But we do not think this well settled principle applies to the case before us. Without stopping to inquire whether the Orphans' Court had obtained such jurisdiction in this case as would, in cases where the jurisdiction of both courts was entirely concurrent, prevent the Chancery Court from interfering, we think that it is very clear that there are executory trusts created by the will of George Hayes which devolved upon the executor, and which the Orphans' Court had no power to enforce. Such, for example, as the investment of the proceeds of certain crops to be raised in bank stock, and the payment of the dividends to the complainants, the designation of a fund for the support and education of the complainants under the direction of the executor, the outfit for the daughters under the 11th section of the will, the sale of lands lying without this State, and the like. To take an account growing out of the execution of these express trusts, or the enforcement of their execution, if not of exclusive equitable cognizance, certainly justified a resort to a court of equity as being the only tribunal which could afford *adequate* relief. So that we are of opinion, that even had a settlement between the executor and the estate been pending at the time this bill was filed, it would have been entirely competent for the Chancery Court to take cognizance of the cause and to arrest the further action of the Orphans' Court in regard to it. The complicated and numerous matters of account, connecting themselves either immediately or remotely with these express trusts, very clearly show, we think, that the Court of Chancery alone could have furnished adequate relief.

After the passage of the statute in England requiring the spiritual courts to make distribution, it was insisted that distribution ought to be made in that court, but in answer to the objection Lord Keeper King, as early as 1682, said that "the spiritual court had but a lame jurisdiction, and there being no negative words in the act of Parliament, he thought a bill for distribution very proper in this (chancery) court."—Matthews v. Newby, 1 Vern. 133. Judge Story says, "for a great length of time the usual resort has been to the Court of Chancery to settle the administration of estates; so that, practically speaking, in cases of any complication or difficulty, it has acquired almost exclusive jurisdiction." There are many cases where it is impossible

for any other court to administer full and satisfactory relief between all parties in interest."—1 Story's Eq. Juris. § 543. The remedy in the Orphans' Court being cheaper and more expeditious than that afforded in Chancery, this court, at an early day, doubtless more as a matter of sound policy than of strict legal requirement, was inclined to confine heirs, distributees, &c., of deceased persons' estates, to the Orphans' Court, in cases where the powers of that court were adequate to administer full relief. —Gayle v. Singleton, 1 Stew. 572. But we apprehend the rule is undeniable, that the rightful jurisdiction originally exercised by courts of equity, is not impaired by legislative enactment conferring a similar jurisdiction upon any other court, unless there be prohibitory or restrictive words used, denying the exercise or continuance of such jurisdiction to the courts of chancery.—Story's Eq. Juris. § 80; Dement v. Boggess, 13 Ala. 143. And this court has repeatedly sanctioned the exercise of such jurisdiction on the part of the Chancery Courts.—Singleton & Gayle, *supra;* Cherry v. Belcher, 5 Stew. & Por. 133; Dobbs et al. v. Distributees of Cockerham, 2 Por. 328; Levens v. Butler & Wife, 8 ib. 300; Blakey's Adm'r. v. Blakey's Heirs, 9 Ala. 394; Scott v. Abercrombie, 14 ib. 270; King & Ansley v. Smith & Steele, 15 ib. 264; Horton, Adm'r. v. Moseley, 17 ib. 794; Pearson et al. v. Darrington, 18 ib. 348.

But it is further strenuously insisted, that the administrator with the will annexed, and not the distributees, should be entitled to call upon the executor to account, and that the several statutes of 1806, 1821 and 1846 must all be construed in *pari materia*, as constituting but one body of statutory laws upon this subject, and that these statutes clearly recognize the right of Leachman, the administrator *de bonis non* with the will annexed, to the assets belonging to the estate in the hands of the executor, and to an account for the waste committed, or the effects misapplied by him.

It must be borne in mind that this bill was filed before the statute of 1846 was passed, and the case must be decided without regard to that statute; for I take it to be the law, that although the act at the time of the trial authorized the administrator *de bonis non* to maintain a bill against the administrator in chief, it does not relate back so as to destroy the complainants' action if well brought. It is a maxim as old as the law,

that "*nova constitutio futuris formam imponere debet, et non præteritis.*"—Bract. Lib. 4, fol. 228; 2 Inst. 292; Bacon's Abr. Tit. Statute, C. In general, the law as it existed at the time the action was commenced must decide the rights of the parties, unless the Legislature express a clear intention to vary the relation of the parties.—Hitchcock v. Way, 6 Adol. & Ellis 943; S. C. 33 E. C. L. R. 253, and cases there cited. And this rule applies as well to remedial as to other statutes.—Per Story J., Prince v. U. States, 2 Gal. C. C. 208. A retrospective statute in respect either to contracts or property would violate every sound principle, and partakes in its character of the mischiefs of an *ex post facto* law.—2 Dwar. Stat. 677, 680-81; Paddon v. Bartlett, 3 Adol. & Ellis, 884; 30 Eng. C. L. R. 258. The rights of the parties, whatever those rights were, attached before the act of 1846 was passed, and as it contains no express words giving it a retrospective operation, the court would violate not only sound principle, but multiplied precedents, were we to construe it so as to defeat the action rightfully commenced.—See Latless v. Holmes, 4 T. R. 660; More et al. v. Phillips, 12 Me. & Wels. 536; Unwin v. St. Quintin, 11 ib. 286.

The act of 1846 out of the way, what is the correct construction of the previous acts conferring upon the administrator *de bonis non* certain remedies against the first administrator or executor? We think that construction has been very clearly settled by several adjudications of this court; adjudications which we are unwilling to disturb, even though we should doubt their correctness, as no hardship or inconvenience can result from adhering to them. We should on the other hand impose a hardship upon suitors to require them to conform to the law which we unsettle or render doubtful by our decisions. Hence it is that courts are usually governed by precedents, which establish rules governing the practice, or settling the construction of statutes or questions respecting real estate.—2 Dwarr. Stat. 785; Doe ex d. v. Allen, 8 T. R. 504; Broom's Maxims, 65 and cases cited.

Let us then turn to some of the previous decisions of this court, and see whether the settled construction of these statutes is not adverse to that insisted on for the plaintiff in error.—In Chamberlain v. Bates, 2 Port. R. 550, it was held that the authority of an administrator *de bonis non* extends only to such of

the personalty of his intestate as remains in specie, unaltered or unconverted by his predecessor, and so far only can he be regarded as a trustee for distributees and creditors; that the commission or letters of an administrator *de bonis non*, as his name imports, extends only to the unadministered assets; and that he could maintain no action against the former executor or administrator, either at law or in equity, for assets wasted or converted by him, but such suit must be brought by creditors, legatees or distributees. In this case the former administrator had died, and the administrator *de bonis non* brought assumpsit against the representative of such former administrator, to recover a sum of money alleged to have been received by him, and never accounted for or paid over. The action was disallowed. The Chief Justice, in delivering the opinion, however, said, that "if administration be granted to an improper person, or by an improper court, and afterwards revoked, the subsequent administrator properly appointed has a general commission of the administration, and is thereby entitled to call the displaced administrator to account, as in the case of an administrator *de son tort*." In the case of the Judge of the County Court of Benton v. Price et al. 5 Ala. R. 36, the act of 1806 is referred to, and the court say "the act only applies where letters of administration have been revoked for any of the causes mentioned in it," and that even in such case, it may be questionable, whether an action can be maintained where the assets have been wasted or converted.—In Moore et al. v. Armstrong, 9 Port. R. 697, the administrator in chief became a non-resident, and the bill was filed against him by the distributee; the administrator died, and the bill was amended, making the administrator *de bonis non* a co-plaintiff with the distributee; a demurrer for this misjoinder was held to have been properly sustained.

In Willis v. Willis, 9 Ala. R. 721, the Orphans' Court proceeded to render a decree and award execution in favor of the administrator *de bonis non* against the former administrator, whose letters of administration had been revoked for a failure to renew his bond. The court cite the previous cases of Chamberlain v. Bates, and Judge Benton County Court v. Price, *supra*, and hold the decree erroneous, at least so far as the award of execution is concerned.

In Nolly v. Wilkins, 11 Ala. R. 872, the administrator with

the will annexed was cited to give additional security. He came in, filed his accounts and vouchers for settlement, and resigned his trust. A settlement was ordered, and Wilkins was appointed administrator *de bonis non*, in whose favor a decree was afterwards rendered, and execution awarded for the assets in the hands of the former administrator. It was held that such administrator could only recover from his predecessor, whether he has resigned or been removed from his office, the assets which remain in his hands in specie unconverted, and that a settlement could only be made between him and the distributees or legatees of the estate. This, of course, was confined to cases where the estate was solvent; for where the estate proved insolvent, the act of 1843 confers upon the administrator *de bonis non* the right to sue the former administrator, either in the Orphans' Court, or any other court of law or equity, to recover the assets belonging to the estate.

In King and Ansley, administrators, v. Smith and Steele, 15 Ala. R. 264, the plaintiffs as administrator *de bonis non* with the will annexed of Jeremiah Smith, deceased, filed their bill in equity against Smith, the former administrator, who had been removed, and his security on his bond, for an account of the assets of the estate, which the former administrator had received and failed to account for, &c. We held that prior to the act of 1846, a Court of Chancery would not entertain a bill filed by the *administrator de bonis non* against a former executor or administrator in chief of the same estate, for an account of the assets that had been wasted, embezzled or misapplied by him. True, this case might well have turned exclusively, as it did mainly, upon another point, namely, that the former executor had come to a full and final settlement with the Orphans' Court, which had jurisdiction, and which we held concluded the parties in equity, no grounds for impeaching the decree being averred in the bill. Nevertheless, the other point was expressly decided, and, as will appear by the previous cases, was sustained by their authority.

It is very manifest from an examination of these cases, that this court has not been disposed to extend the provisions of the 40th section of the act of 1806, but by a strict construction of its provisions, to confine its operation to cases where the letters of administration have been revoked, because they were granted upon insuffi-

cient security, and the administrator has failed to give sufficient security upon being required to do so by the Orphans' Court, or when it should appear upon examination, that the administrator had embezzled, wasted or misapplied the decedent's estate.

The fourteenth section of the act of 1821 authorizes the court to require of the executor, administrator, or guardian, further security, upon complaint being made by any of those who have gone on his bond, or when it is made to appear that there are sufficient grounds for believing that he is about to waste, embezzle or misapply, or remove from the State, the property committed to his charge, or on proof of gross neglect, &c., or that his securities have become insufficient, as well as for the causes heretofore specified. This section fails to provide what the court shall do on the failure of the administrator or executor to give the additional security which is required, nor does it confer any authority upon the court to remove such delinquent administrator; but by the fifth section of the same act, (Laws of Alabama by Toulmin, 193,) the judge of the County Court is empowered to repeal letters testamentary, and of administration, to appoint and displace guardians, &c., and to make all necessary orders for the issuing process and other purposes within his jurisdiction, according to such regulations as are or may be established by law in such cases; so that we apprehend the argument of the counsel for the plaintiff in error, that the fourteenth section would be utterly powerless, unless, for its enforcement, it may borrow the consequences attached as the penalty by the fortieth section of the act of 1806, fails, since this act justified the court in displacing the executor or administrator. But without consuming further time on this point, we feel quite sure that the construction placed by this court, in the cases previously cited, is opposed to that contended for by the counsel for the plaintiff in error, and shows that this suit may well be maintained in the name of the distributees. The court has refused to indulge a doubtful construction in favor of enlarging the powers of an administrator *de bonis non*, from considerations of policy. There would usually be delay, and cases might readily be imagined where there would be great hardship and injustice done to legatees, distributees and creditors, by continuous removals and appointments of successors, if the creditor or the distributees or legatees should be compelled to wait the tardy pro-

cess of a suit between the out-going administrator and his successor, and perhaps again between the latter and his successor, until, to say nothing of the hazard of total loss consequent upon these changes, the funds would be greatly lessened by costs and commissions as it swept along the tide of litigation.—Chamberlain, adm'r. v. Bates, adm'r. 2 Port. R. 559; Coleman v. McMurdo, 5 Rand. R. 51. We think the statutes furnish no objection to the maintenance of the action directly by the complainants to this bill.

But it is contended for the plaintiff in error, that the will in this case creates continuous trusts, which devolve upon the successor, and that according to its provisions, the complainants are entitled to no decree other than to provide for the security of the assets, which are not shown to be in any danger, and that therefore, the bill was prematurely exhibited. The demand against the executor, which these complainants assert, and the decree itself, is for moneys which they insist he should pay. If this fund, or any portion of it, is needed to pay the debts due from the estate, it is clearly competent for the Chancery Court to call the creditors before it, and to make this disposition of it. By the fifteenth clause in the will, all the surplus proceeds, after the maintenance and support of the plantations, which the testator desires should be kept up, together with all moneys arising from the sale of lands, or accruing to the estate from any other sources, except as is otherwise provided in the will, are required to be invested in the safest bank stock, which is to be a permanent fund, the interest or dividend to be equally divided amongst the testator's three children. It is the duty of the court, as far as can be done, to effectuate the intention of the testator, by carrying into execution the provisions of his will. The farms then must be kept up, and the proceeds, as well as the funds derived from other sources, except such as may be required to carry out the previous provisions of the will, must be invested as required, if the same can be profitably done. But the paramount duty of the executor was, and of the administrator with the will annexed now is, to pay the debts, and until they are paid, the heirs or distributees are entitled to no portion of the estate.—Thrash v. Sumwalt, 5 Ala. R. 14. It may be, for aught that we can judicially know, that after the debts are paid, the exigencies of the estate which is to be kept

together until the period designated in the will, may require the expenditure of a portion of these funds. If so, it is very clear that the administrator with the will annexed should be allowed to appropriate them in that way. So we conclude, that in so far as the discharge of the duties devolved upon the administrator *de bonis non* by the will requires the appropriation of all or any portion of the money here decreed, to that extent should the funds have been decreed in furtherance of such objects. But how could the debts be paid, or the interest of the estate, as respects the duties devolved upon the administrator with the will annexed, be protected and forwarded in the absence of the creditors, and of such administrator? None of them were made parties, or brought before the court, or the master, in any way. The decree therefore, which gives the fund to the complainants absolutely, without regard to the demands existing against the estate which remain unsettled, without regard to the necessities of the estate, growing out of the duties devolved by the will upon the personal representatives, is erroneous. Ordinarily, where the distributees file a bill for an account against an out-going administrator, it may not be necessary to make the administrator *de bonis non* a party.—Draughan v. French, adm'r. 4 Port. R. 352. But the will in the case before us gives the administrator the funds, if necessary to the maintenance and support of the plantations, while it confers upon the complainants the right to demand the means necessary for their maintenance and education, and the payment of the interest or dividends, which will accrue from an investment of the surplus means to be derived from the estate. There can be no surplus until the debts are paid, and until the fact is ascertained, that the condition of the plantations is such as to require no appropriation to be made for their support and maintenance. It then follows, that in taking an account so as to distribute this fund, the administrator *de bonis non* should be made a party defendant, and the bill should show that no claim of his was set up, or, if set up, that the same constituted no charge upon this fund, which should intervene between them, and an absolute appropriation of the money to them, or for their benefit as contemplated by the will. As to the creditors, they may (as we have before said,) be brought in before the master, as in case of a creditor's bill. We think the complainants, in regard to the fund re-

covered, occupy substantially the relation of residuary legatees, being only entitled to the appropriation for their benefit of the surplus or residuum, after satisfying the previous charges upon the fund. In such cases, it is well settled that all other persons interested in the distribution must be made parties, so that only one account may be taken.—Atwood v. Hawkins, Finch, 113; West v. Randall, 2 Mason's C. C. R. 181; Sherrit v. Birch, 3 Bro. C. C. 229; Parsons v. Neville, ib. 365; Julian v. Reynolds, 8 Ala. R. 680; Edwards on Parties, 138; Peacock v. Monk, 1 Ves. Sr. 127; Cockburn v. Thompson, 16 Ves. Jr. 321; Pritchard v. Hicks, 1 Paige's C. R. 270. At all events, the bill should be so framed, as that the interest of all parties might be protected, and the trusts created by the will properly enforced according to the intention of the testator.—Story's Eq. Plead. §§ 104-105, and notes, (4th Ed.)

We are further of opinion, that this defect in the frame of the bill might be taken advantage of on general demurrer; for it is impossible for the court to say what amount will remain after the debts are paid, and the amounts necessary (if any) to maintain the plantations, until an account is taken of these matters, and no account was or could be taken of them under the bill as at present framed, the parties interested therein not being before the court by any of the modes allowed by the practice.—1 Stew. & Port. 317; 2 Stew. 280. The omission of an indispensable party is an error for which a decree may be reversed on error, though the objection be made for the first time in the appellate court.—18 Ala. R. 576. The demurrer therefore should have been sustained, and leave given the party to amend, so as to bring the proper parties before the court, as the practice in such cases is not to dismiss for want of proper parties, but to let the case stand over for an amendment or supplement to the bill, as the case may require.—Rugely et al. v. Robinson, 10 Ala. R. 703; Batre v. Auge, 5 Ala. R. 179; Toulmin v. Hamilton, 7 ib. 369; Alderson v. Harris, et al. 12 ib. 580.

Having disposed of the question of parties, let us consider the next proposition; whether the case made by the record justifies the interposition of the Chancery Court, so as to withdraw it from the Orphans' Court, which had ordered initiatory proceedings for the final settlement of Gould's executorship.

Without in this place going into a critical examination of the

numerous allegations of the bill charging both non-feasance and malfeasance, not only in regard to the executorial duties proper, but also with respect to the several trusts devolved upon the executor by the will, and without stopping to ascertain how far the proof sustains all or any of them, we feel quite sure that the whole case presented by the record is one in which the Court of Chancery is alone competent to afford *full relief*. This is manifest from an examination of the will, and the account which was filed by the plaintiff in error in the Orphans' Court, and which, he insists, exhibits the true condition of the monetary affairs of the estate. The account, aside from the various matters of explanation which the answer discovers, is certainly unsatisfactory. It furnishes no definite idea of the manner in which the estate has been managed, or of the assets remaining on hand. It sets forth the receipt by the administrator of $63,124, and although but a comparatively small amount of debts due from the estate at the time of the testator's death appears to have been paid, still the account brings the estate in debt to the executor in the sum of $3,957, the main bulk of the sums received having been disbursed in the payment of expenses attending the prosecution and defence of law suits, the defraying the expenses of the farms in the matter of overseer's wages, physicians' bills, provisions &c., and still leaving a considerable sum due of debts, which he had contracted, and which remained unpaid when he was removed from office. Besides, a portion of the sums collected for rents accrued upon lands not disposed of by the will, and these descended to the complainants who are the heirs at law of the testator. It is not shown that these lands were rented to the highest bidder at public out-cry, as required by the statute of 1839, (Clay's Dig. 199, § 36,) and if the executor rented them out otherwise than authorized by law, his act was unauthorized, and he would hold the proceeds in trust for the complainants.—Martin, ex'r, v. Williams, 18 Ala. R. 190. To obtain a full discovery, and as indispensable to a correct and satisfactory settlement of this complicated account, we do not entertain a doubt, but that the complainants might properly resort to the Chancery Court, especially as they had the right to have an account of the manner in which he had discharged the duties imposed by the will as express trusts, and which, we have before shown, were so intimately blended with his executorial

duties as to require an account of each to be taken, in order properly to settle either. The surplus only is to be invested in bank stock, and to arrive at this surplus involves an inquiry as to the execution of the trusts created by the will, as well those within, as those without the jurisdiction of the Orphans' Court.

In addition, however, to all this, the account exhibited by the executor claims, as a compensation for his services, the sum of ten thousand five hundred dollars. As compensation to trustees is allowed as a reward for the faithful execution of the trusts confided to them, it was due to the court, which must admeasure the compensation, and to the parties, that the history of the executor's proceedings should be fully made known. The court could then determine whether it was called upon to compensate intelligence, integrity, industry, vigilance and enlightened activity on the part of the executor in the discharge of his duties, or whether he had not forfeited all claims to compensation by his wilful neglect and gross negligence, which have resulted in damage to the estate he represented.—5 Barr's R. 416-417. For the reasons above stated, we conclude, that although the complainants may have failed to sustain by proof the allegations of waste and mismanagement charged, still, enough does appear unquestionably to justify the interposition of the Chancery Court.

We come now to consider the last proposition, as to the compensation to be decreed to the executor. We do not think that the proof furnishes any evidence that he acted in bad faith, or that he has been guilty of wilful default, or such gross negligence as should deprive him of compensation. The rule upon this subject with us, as asserted in Powell et al. v. Powell, 10 Ala. R. 914, and recognized as correct in a number of cases, is not to refuse to executors or administrators reasonable compensation, except in cases of wilful default or gross negligence, by which loss to the estate has been the consequence.

It is the anxious desire of Courts of Chancery to protect trustees from harm, who act in good faith, and not to subject their conduct to the application of such harsh and rigid rules as to deter all prudent men from assuming fiduciary duties and relations. The court must also look to the number and nature of the duties to be performed, and while it will exact the exercise of that care, diligence and forethought in the discharge of those

duties which a prudent man would bestow upon his own business of a similar character, it will not be astute to hunt out and seize upon every slight departure from the strict line of discretion and good management. Nor should it look merely at the result, which may be unfavorable to the interest of those concerned, and conclude from thence, that the trustee has been guilty of gross negligence or mismanagement, since it often happens that the best laid schemes fail of success. Such is the imperfection of our nature, and the vicissitudes to which we are exposed, that even the most wary, discreet and prudent are not exempt from misfortunes and failures.

In the case before us, the result of the executor's management was certainly unfortunate to the interest of the estate. Much the larger portion of what has been received by him has been expended, as we have said, in cost consequent upon fruitless litigation, upon overseers, in bills to physicians and other expenses; but when we take into account the number of the duties devolved upon the executor, the size of the estate, consisting of many slaves and several plantations with stock of different kinds, as also of a large quantity of lands, some of which were occupied by irresponsible tenants, the enlarged discretion with which the testator invests his executor by his will, the disposition to insubordination which seemed to prevail among the slaves, and the diversified interests which required to be guarded, it is not to be expected that the executor should be able to conduct its affairs without incurring considerable expense, and without sometimes mistaking its interest. The farms appear to have been managed at least ordinarily well. The litigation, we think, was such as the executor, influenced solely by a desire to advance the interest and protect the rights of the complainants, might well have engaged in, and the points in the main case of such difficulty as to require the retainer of eminent counsel for their discussion, and who, of course, were entitled to reasonable compensation for their services.

Many minor objections to the conduct of the executor, as furnishing evidence of neglect and malversation, were taken by the counsel for the defendants in error, and were discussed with much zeal and ability; but without extending this opinion to too great a length by noticing each separately, we deem it sufficient to say, that we have examined them, and are unable to bring

our minds to the conclusion, in view of all the circumstances and explanations afforded by the answer and proof, that the executor was guilty of wilful default or gross negligence in the discharge of his duties, so as to justify the court in denying to him all compensation.

In allowing compensation, we think the court should have been governed by the act of 1841, (Clay's Dig. 228, § 39,) which fully empowers the court, in cases where estates are required to be kept together for distribution at a future day by the will of the testator, to allow to the executor for his attention and services, in lieu of commissions, such annual compensation as shall be reasonable, "having regard to the amount of labor performed, the responsibility involved, and the value of the estate."

Under the law as it previously existed, the executor or administrator was allowed commissions upon his receipts and disbursements. However just this may be as respects the administration of estates in the ordinary course of proceeding, it will readily strike every one that cases may occur, where such a criterion for compensation would be wholly inadequate. There may be large estates required to be kept together for the maintenance of families, and the raising of slaves, stock, &c., in the administration of which but a very inconsiderable amount of money would be received or disbursed, yet the whole time and attention of the representative might be required in their management for many years. To provide a remedy in such cases, and to prescribe the manner in which the court should arrive at a reasonable compensation, was the design of the section of the act which we have quoted. He is not only to be compensated for the actual amount of labor performed, but regard is also to be had to the responsibility incurred, and the value of the estate. It is our opinion, that in cases coming within the purview of this act, the court, if it allows compensation at all, should estimate it according to the requisitions contained in it, and should not limit the party to commissions upon the receipts and disbursements.

It may be true, as contended for by the defendants in error, that in this case the Chancellor has allowed the executor, as commissions, a greater compensation than under all the circumstances of this case he would be entitled to according to the provisions of the statute. We express no opinion as to the

amount he should receive, but leave this to be ascertained upon a future reference to the master. All we decide is, that the executor, being entitled to compensation, had the right to insist upon its allowance according to the principles which the statute embodies as governing the compensation, for his attention and services, namely, "having regard to the amount of labor performed, the responsibility involved, and the value of the estate." These data have been disregarded in the decree before us, and the question of compensation should be again referred to the register, with instructions to ascertain what is reasonable, estimating the same according to the rule laid down in the statute. We think that the executor having the right to compensation, and having been required by the will to keep the estate together for distribution at a future time, has the right conferred by the statute to insist on being compensated in accordance with its provisions; and although the words of the statute are that "the judge shall have full power," &c., yet these should not be construed to vest him with a discretion as to whether he will conform to the statute, or allow commissions merely. Such words, when used in a statute, are regarded as peremptory, where the public or an individual has a right *de jure* that the powers conferred should be exercised.—9 Por. R. 390; 5 Johns. Chan. R. 113; 1 Ver. 152; 3 Atk. 166; Salk. 609.

The failure of the executor to make annual returns does not, under the circumstances of this case, deprive him of the right to compensation. In Craig & Wife v. McGehee & Armstrong, 16 Ala. R. 41, we held that an administrator who has managed the estate with prudence and in good faith, and who has been guilty of no default in settling when required to do so, does not forfeit the right to compensation by failure to make annual returns. The cases cited from South Carolina, which favor a contrary doctrine, have not been followed by this court. Indeed, these adjudications were upon a statute of that State, which denies compensation if such returns have not been made.—3 Eq. R. 78. In this State, there is no such enactment.

We have shown that the staute of 1846 has no retrospective effect, to take away the right of action from the plaintiffs; so neither can the act of 1841 confer upon the defendant below a right to annual compensation for services rendered anterior to its passage. As to such service, he must be compensated as the

law then stood, and the master, in estimating his allowance for them, will receive instructions accordingly.

Let the decree of the Chancellor be reversed, and the cause be remanded for further proceedings in conformity to the principles stated in this opinion.

LYON'S HEIRS *vs.* MOTTUSE.

1. A writ of right at common law would lie only to recover a fee simple estate, and in favor of him who had the fee simple title.
2. A count which does not allege a seizin in fee simple, either in the demandant or in the ancestor through whom he claims, is defective as a count in a writ of right, although it alleges the disseizin of the demandant's ancestor.
3. But it is sufficient as a count in a writ of entry *sur disseizin*, especially after verdict, the gist of that action being the wrongful disseizin without regard to the mere right of property.
4. A count which alleges the disseizin of the demandant's ancestor, and which is insufficient as a count in a writ of right for want of an averment of seizin in fee, must be considered as a count in a writ of entry.
5. The character of a suit is determined by the declaration, and not by the plea.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

THE opinion in this case decides that the action is a writ of entry *sur disseizin*, and not a writ of right. The demandants, by their declaration, "demand against Cataline Mottuse, by a writ of right, those certain parcels of land," &c. (describing them,) "which they, the plaintiffs, claim to be their right and estate, as heirs of James Lyon, deceased, and whereof the said Cataline Mottuse unjustly and without judgment disseized their said ancestor within the last thirty years." The declaration then sets out their pedigree, and concludes thus, "and of this, their right aforesaid, the plaintiffs offer to make proof." The

defendant's plea is thus stated: "The defendant joins in the mise in short by consent." The court charged the jury, that under the evidence in the case, the title of the plaintiffs was superior to that of the defendant, but to entitle them to a recovery they must prove the disseizin of their ancestor within thirty years next before the commencement of the suit. There was a verdict and judgment for the defendant.

SEWALL, for plaintiffs in error:

1. The averment of disseizin in a writ of right is unnecessary, and must be regarded as surplusage, and need not be proved.—3 Co. Litt. (223) n. (225;) Jackson on Real Actions, 277, 286; 3 Black. 150, 193-4. All beyond what is necessary to constitute the cause of complaint is surplusage, and need not be proved.—1 Chitty Pl. 229-30.

The averment of disseizin in a writ of entry is essential, and the general issue is, did not disseize, &c., and yet the demandant is not required to prove disseizin, but if he prove his seizin as alleged, the tenant must then justify the entry under which he holds the land, &c.—Jackson on Real Actions, 25, 27, 46-7, 154-56-57-61.

In writs of entry plaintiff is not required to prove an actual ouster.—Higbee et al. v. Rice, 5 Mass. 344; Stephens v. Winship, 1 Pick. 318.

The averment of disseizin in this case is equivalent to an averment of seizin in the ancestor, and in this sense it is a material allegation, and was proved. The ancestor could not be disseized unless he were seized.—Ward v. Bartholomew, 6 Pick. 413.

But if there was a defect in this respect in the writ and count, it was cured by the plea. The defendant did not traverse the seizin, but only joined the mise in the mere right. This was an admission of the demandants' seizin and their title to the land, and cast the *onus* on the defendant of showing a better title.—Jackson on Real Actions, 46-7, 259, 291.

JOHN A. CAMPBELL, *contra:*

1. The question is whether this is an action on the mere right, or for a disseizin? Is it a writ of right, or a writ of entry *sur disseizin?* The form of the declaration in these two kinds of action may be found in Fitz. Nat. Brev. 442; Boothe on Real

Actions, 175 and 177; Stearns on Real Actions, 129. All these authorities show that the form of the count in this case is that of a writ of entry, and not a writ of right.

The count would be fatally defective as a writ of right. It contains no averment of a fee simple estate, either in the plaintiffs or their ancestor. There is no averment of a seizin of that kind of an estate which justifies a writ of right. Seizin in the ancestor cannot be inferred from the averment of disseizin.—7 Wheat. 28; 3 Bibb 54; 11 Shep. 14.

2. The plea cannot determine the character of the action. "Joining the mise," is nothing more than joining the issue.—Roscoe on Real Actions 215, (26 Law Lib.)

DARGAN, C. J.—The material inquiry, growing out of the pleadings and the instructions of the court, is to ascertain the character of the action, that is, whether it is a writ of right, or a writ of entry *sur disseizin*. In the count it is alleged that the premises are demanded by writ of right, but after describing the land, the plaintiffs set forth their title thus: "which they, the said plaintiffs, claim to be their right and estate as heirs of James R. Lyon, deceased, whereof the said Cataline Mottuse, unjustly and without judgment, disseized their aforesaid ancestor within the last thirty years." The count then states the pedigree of the plaintiffs, showing them to be the heirs at law of James R. Lyon, and concludes with an offer to prove their right. To this count the defendants filed the following plea: "The defendants join in the mise in short by consent." Upon the evidence the court instructed the jury that the plaintiffs had the superior title, but to enable them to recover, they must prove the disseizin of their ancestor within the last thirty years.

If this count can be considered as one in a writ of right, it is clear that the court erred, for the defendant's informal plea, merely joining in the mise, put in issue the mere right or title only, and the disseizin was wholly without the issue, and unnecessary to be proved.—Inglis v. The Sailor's Snug Harbour, 3 Peters, 133; Greene v. Watkins, 7 Wheaton 27; Jackson on Real Actions, 289. Indeed, it is unnecessary to allege a disseizin in a writ of right, and in none of the precedents is it to be found.—Boothe on Real Actions, 92; Stearns on Real Actions, 443-4, Appen.; Jackson on Real Actions, 277.

But the writ of right can only be brought by one who has the fee simple title to the lands.—3 Black. Com. 191; Stearns on Real Actions, 357; Jackson on Real Actions, 278. And therefore it was that one who had a less estate than a fee simple, and who was barred of all possessory actions, was without remedy. To remedy this defect, the writ of formedon was given to tenants in tail by the statute of Westm. 2, (13 Edw. 1,) and the same statute gave to owners of particular estates, such as tenants for life, in dower, and in curtesy, a writ, called a *quod ei deforciat*, by which they could regain possession of their lands, which had been recovered of them in any of the possessory actions in consequence of their neglect or default.—3 Blackstone, 193. But the pure writ of right at the common law would lie only to recover a fee simple estate, and in favor of him who had the fee simple title. Therefore it is necessary that the count should show that the demandant had a fee simple title. This is done by alleging his seizin, or the seizin in fee of his ancestor, through whom he claims, in his demesne as of fee of right, and in none of the precedents is this allegation omitted.—Stearns, 444; Boothe 9; 3 Chitty 1359. Testing the count by this rule, it is defective as a writ of right, for there is no allegation to show that James R. Lyon, through whom the plaintiffs claim, was seized in fee simple. Indeed his seizin is not averred at all but by the allegation of his disseizin, and if we admit that this is sufficient to show seizin, on the ground that he could not be disseized unless he had been seized, still the allegation falls far short of showing that he was seized in fee simple, for he might have been seized of a less estate than a fee simple. The count is defective as a count in a writ of right.

But it is sufficient considered as a count in a writ of entry, especially after verdict, for the gist of the action is the wrongful disseizin, without regard to the mere right of property. It decides nothing as to the ultimate fee simple title, but only restores the demandant to the same situation in reference to the land in which he was before he was dispossessed. But this restoration is without prejudice to the ultimate right of ownership, for if the disseizor has the ultimate fee simple title, he may, after verdict and judgment against him *in a writ of entry*, assert his title by a writ of right, and thereby regain the possession.—3 Black. Com. 180.

As the writ of entry is founded on the disseizin of the demandant, or those through whom he claims, it is only necessary to allege his seizin, or the seizin of the ancestor through whom he derives title, and the disseizin by the tenant, or by him through whom he derived possession; hence it is that seizin in fee simple need not be alleged in this action, for it may be maintained by one who has a less estate than a fee simple, as by tenant for life, in dower, by the curtesy, and by tenants in tail.—Stearns on Real Actions, 139; Jackson on Real Actions, 27. We therefore think that the allegation of disseizin is sufficient after verdict in a writ of entry, which is founded on the disseizin, and not upon the mere right of the demandant, and that the count is good considered as a count in a writ of entry, but that it is insufficient as one in a writ of right. Consequently it should be considered as a count in a writ of entry, and not as one in a writ of right. Indeed, it has been decided that if the count contain the allegation of disseizin, it must be considered as a count in a writ of entry, and not one in a writ of right, although without the averment of disseizin it would have been good as a count in a writ of right.—Plumer v. Walker, 24 Maine, 14. But without determining on the correctness of this decision, I am satisfied that if the count contains the allegation of disseizin, and is insufficient as a count in a writ of right for the want of an averment of seizin in fee, it cannot be considered in any other light than a count in a writ of entry, the gravamen of which is the tortious disseizin, and must be proved under the general issue. Attaining this conclusion, I am satisfied that the court did not err, in charging the jury that it was incumbent on the plaintiffs to prove the disseizin of their ancestor as alleged.

But it is urged that the character of the plea must determine the character of the count, and as the plea is applicable only to a count in a writ of right, it must be so considered. To this argument I cannot assent. We must look to the declaration itself to determine the character of the suit, not to the plea. For instance, the plea of non-assumpsit to a declaration in trespass would not change the character of the suit, and convert it into an action of assumpsit.

Upon the whole, I see no error in the ruling of the court of which the plaintiffs can complain, and the judgment must therefore be affirmed.

GODWIN *et als. vs.* McGEHEE *et als.*

1. When a bill is filed by the creditors of a Rail Road Company against its debtors, for the purpose of subjecting the money in their hands to the payment of the debts due the complainants, and such debtors do not offer to bring the money into court, but engage in a protracted litigation respecting it, and insist upon their right to retain it, both as against the complainants and the company, they are properly chargeable with interest upon the balance found to be due from them to the company.
2. In general, a court will not decree interest on a balance unless it is specially asked for in the bill, but this rule applies only to interest due at the time the bill is filed. When the interest accrues subsequently, it is the practice of the court, upon further directions, to order that the interest be computed, although there is no prayer in the bill to that effect.
3. W. M. placed in the hands of A. M., who was bound as surety for him on several debts, certain bonds of the Montgomery R. R. Company, with the understanding that A. M. should endeavor to collect them and should apply the proceeds to the payment of the debts for which he was bound as surety. G. and other judgment creditors of the R. R. Company afterwards filed a bill against A. M. and other stockholders, for the purpose of condemning their indebtedness to the company to the satisfaction of complainants' judgments against it, the company being insolvent. A. M., before the service of the subpœna upon him, paid some of the debts for which he was bound as surety for W. M., and after he had been served with process, the whole amount of the bonds assigned to him by W. M. was passed to his credit on the books of the company. A settlement of their accounts was afterwards made between A. M. and W. M., in which A. M. accounted for the bonds which he had received, at their market value, fifty cents on the dollar: *It was held*,
   1. That A. M. was entitled to a credit on his indebtedness to the company, of the amount which he had paid as surety for W. M. before the service of the subpœna upon him.
   2. That his right to retain, as against the complainants, only extended to the *amount actually paid by him*, and was not affected by the depreciation in the market value of the bonds, or the subsequent settlement between him and W. M.

ERROR to the Chancery Court of Montgomery. Tried before the Hon. J. W. Lesesne.

GODWIN *et als.*, who were all judgment creditors of the Mont-

gomery Rail Road Company, after exhausting their legal remedy against the Company by executions returned "no property found," filed this bill against Abner McGehee, T. M. Cowles and others, stockholders in the Company, for the purpose of subjecting their indebtedness to the Company to the satisfaction of complainants' judgments. The Chancellor dismissed the bill, but his decree was reversed by the Supreme Court, (11 Ala. R. 437,) and the cause was remanded that an account might be taken of the indebtedness of the several defendants to the R. R. Company, in accordance with the principles settled by the decision. The account was taken, the master's report was confirmed, and the cause was again brought to the Supreme Court, for the purpose of reviewing the Chancellor's decision on the several exceptions which were taken to the master's report. The cause was again reversed and remanded that the account might be retaken as to the defendants, Cowles and McGehee, (15 Ala. 232.) The account was retaken, and each party being dissatisfied with it, the cause was brought to the Supreme Court the third time, on cross assignments of error.

All the facts of the case may be gathered from the previous reports of it, (11 Ala. 437; 15 ib. 232,) and the additional proof as to the disputed items of account is so fully detailed in the opinion that its repetition here would be unnecessary.

Elmore and Watts & Jackson, for complainants:

1. There was no error in charging the defendants interest on the amounts ascertained to be due by them to the R. R. Company.

Interest follows as an incident from the time the principal ought to have been paid, *i. e.*, from the time suit might have been brought for the principal.—7 Wend. 109; 10 ib. 96.

An action could have been maintained by the R. R. Company after sixty days from the call provided for in the charter.—3 Ala. 660; 4 ib. 70.

The provision in the charter authorizing the Company to declare the stock forfeited on failure to pay after notice, is merely a cumulative remedy, and does not destroy the common law right of action.—See authorities *supra*, and the authorities there cited.

If the Company had brought suit against the defaulting stockholders, there can be no doubt but that they would have been chargeable with interest, after sixty days from the time of the

call. Now, the complainants, by filing their bill to subject the uncalled for stock to the payment of their debts, are subrogated to the rights of the company, and are only doing what the company ought to have done, to wit, compelling the stockholders to pay the stock for the benefit of creditors. It will be seen by reference to the decree, that interest was charged after the lapse of sixty days from the service of the bill.

When money, in the hands of a third party belonging to a defendant in attachment or judgment, is sought to be condemned by a creditor of such defendant, either in law or equity, if such third party refuses to pay, or in any manner contests the right to have the money applied, or if such third party admits the right, but does not bring the money into court and submit it to the decree of the court, he will be compelled to pay interest.—7 Ala. 217; 3 Sandf. Ch. R. 466; 1 Dana 338; 1 Barbour's Ch. R. 82.

By the report of the Register this money is ascertained to have been in the hands of the defendants, McGehee, Cowles and Harris, at the time of the filing of the bill. McGehee and Cowles deny that they owe, and contest complainants' right to have it applied as sought, and Harris does not bring the money into court and submit it to the decree of the court for application. They are, therefore, all properly chargeable with interest.

As to Cowles' liability on the thousand dollar bond. The proof taken before the register the last time does not alter the effect of that taken at the first reference. This court held when this case was previously before it, that Cowles should be charged with it. —15 Ala. 246.

2. The chancellor erred in allowing Abner McGehee credit for the bonds received from William McGehee.

Because the report and proof show that Abner McGehee, at the time of filing and service of the bill upon him, had no absolute interest, either equitable or legal, in the bonds and estimates. He held them merely as the agent of Wm. McGehee. In order to make them legal sets-off, he must have had some absolute legal interest.—Minor's R. 7; 7 Cow. 480; 7 ib. 469; 10 Paige, 319; Barbour on Set-off 195; 2 Ala. 675; 3 ib. 256; 11 ib. 787, and authorities there cited; 16 East. 130; 8 ib. 368. To make these sets-off in equity, he must have had some abso-

lute equitable interest.—See authorities *supra*—see Barbour on Set-off, 194; 1 Paige, 289; 7 ib. 208. Now what interest did Abner McGehee have in these bonds and estimates at the time the complainants' bill was served upon him? True it is, he had them in possession, and had had them for more than six months. But mere possession is not ownership. Did he have ownership, property, in them at the time he acquired the possession? To determine this, we must look at the terms of the contract, by which he got possession of them, between himself and William McGehee. By that contract he received the bonds and estimates, promising "to try to collect them and pay" certain debts with the proceeds. On these debts Abner was the security of William. He held them merely as the agent of William at most, as collateral security to indemnify himself. He is then not the owner. He never collected them before the filing and service of complainants' bill. He does nothing with them to give him an ownership, unless the payment of the debts provided for in the contract between him and William, gives him an additional right to use them as his own; and can an agent, by a payment for his principal, acquire the right to appropriate his principal's goods in his possession to his own use? This he clearly could not do without the assent of his principal. Here the principal disputed the right of the agent to do this. If he ever gave any assent to the appropriation, it was given at the time of the arbitration, which was in 1843, two years after the filing and service of the bill. This subsequent ratification cannot relate back to the time of appropriation by Abner, so as to defeat the rights acquired by complainants by the filing and service of their bill.—7 Ala. 800, and authorities there cited to this point; also, Story on Agency, §§ 245-6-7 & 440.

The payment of the debt would give to Abner McGehee the right to sue Wm. McGehee for the money paid, and if William was insolvent, possibly in equity he might be entitled to use these bonds and estimates as his own, and thus they might become good as an off-set to the payment of his stock. But there is no proof to show that William was insolvent. The payment of the debts and the insolvency must concur before the off-set could be allowed. Now did Abner pay the debts before the filing and service of the bill? The proof shows that he paid the Mosely debt. But, although it shows that at some time before the

arbitration in 1843, be paid the Baldrick debt, it does not show that it was paid before the filing or service of the bill. It was incumbent upon Abner to show this, to make out his right to the set-off.

The proof nowhere shows the payment of any other debt. On the contrary, it shows that the other two debts were not paid by Abner. As there was a full settlement in 1843 of these matters, and at said settlement William was allowed fifty cents in the dollar on these bonds and estimates, and at such settlement he fell in debt to Abner only about $900, it is very clear that Abner never paid the other debts provided for in the contract with William.

Now giving Abner credit for the Mosely and Baldrick debts, they amount to only about $4,800. Yet he is allowed credit against these complainants and the R. R. Company for $6,701, near two thousand dollars more than he has ever paid, or ever will pay on account of Wm. McGehee. It thus clearly appears that Abner McGehee, without including the two bonds amounting to $1,100, was fully indemnified for all that he was compelled to pay for William. There can be no sort of equity in permitting him to use these two bonds, ($1,100,) as sets-off against complainants; for he had no sort of interest in them. If these two bonds were held originally as collateral security, they could not be sets-off.—1 Watts & Serg. 418; 4 How. Miss. 370; 1 Gilman, 649.

Belser & Harris, *contra*:

1. There is error in the decision of the Supreme Court, in which it reverses the decree of the Chancellor, and charges McGehee with the two bonds for $1,100, and interest on them, &c.

The evidence shows an agreement between the corporation and the subscribers for the stock of the company, entered into before complainants' bill was filed, to receive the bonds of the company obtained by them, in payment of their stock. And this agreement, independent of the insolvency of the corporation, shows the decision of the court to be wrong. None of the previously adjudged cases place McGehee's equity on the ground of having the bonds placed as credits on the books of the company, before the bill was served on McGehee. In fact, they repudiate this idea. McGehee's true case is, that he held the

bonds before complainants' bill was filed, under an implied agreement that they should go in discharge of stock to their full amount, independent of the market value of them, and that the company is insolvent. But the first ground is valid without the addition of the last.—2 Paige 582; 2 McCord's Ch. 184; 14 John. 63; 8 Ala. 217; 15 ib. 233; 12 Wheat. 69; 2 Conn. 260; 1 Pick. 297; 11 John. 118; 4 Ser. & R. 317.

2. McGehee should only be charged with the two bonds for $1,100, with interest from sixty days after the filing of the bill, or the service of the subpœna on him. The two bonds for $1,100 are the only errors complained of by the complainants' solicitors, and the rule is well settled that they cannot get more than they ask in their assignments.

3. The amount of the estimates received by Abner McGehee from William McGehee is about $6,700. The amount paid out by him to Moseley and Baldrick is about $4,800, the Moseley debt, of $4,300, being paid prior to the filing of the bill about five months. The bonds for $1,100, with interest from sixty days after the service of the subpœna, do not amount to as much as the difference between the $7,500 and the $4,800, with interest, as settled by the court.

CHILTON, J.—Since this cause was before us at a previous term, (15 Ala. 232,) it has been re-tried in the court below, and is again before us upon cross assignments of errors, both parties being dissatisfied with portions of the chancellor's decree. We will first dispose of the errors assigned by the defendants to the bill.

1. It is insisted for them that the chancellor erred in charging them with interest on the amounts ascertained to be due from them to the Rail Road Company for stock.

According to the provisions of the charter of the company, if the defendants to the bill had failed to pay within sixty days after the stock was called for, the company could have sued for and collected it. The right to declare the stock forfeited was clearly but a cumulative remedy given by the charter to the company against defaulting stockholders. If, then, a call had been made, and these defendants had made default, and suits had been instituted by the company, we apprehend there would be no question but that they would be bound to pay interest on

their bonds from the time they were payable, namely, from the expiration of the sixty days from the date of the call. The complainants, however, by their bill, have acquired a lien upon this stock, so that the company cannot control it, and the defendants would be bound, at their peril, to disregard any call which the company might make after this lien attached. The company and its debtors having been brought before the Chancery Court, that court became the rightful repository of the fund until the controversy concerning it was ended, when by its final decree, the same would be ordered to be paid out according to the equitable rights of the respective parties.

The fund being called for in the Court of Chancery, it was the obvious duty of the defendants who desired to rid themselves of the payment of interest upon their unpaid bonds, to have tendered the money in court, and, if instead of doing so, they engage in a protracted, expensive, but fruitless litigation concerning it, and hold on to it until obtained at the extremity of the law, it is but equitable and right that they should be required to pay interest. The parties knew, or might have known, the amount of their indebtedness. They were likewise bound to know that after the service of the bill upon them, no demand which they might acquire should be allowed to defeat the right of the complainants to a condemnation of the amounts due from them to the company to the payment of the complainants' judgments. In other words, that the state of the accounts existing between them and the company at the time the bill was served upon them, which brought actual knowledge to them of the pendency of the chancery proceeding, must be that upon which the court would determine their liability. And knowing this, their efforts to obtain credit for demands against the company, which were acquired by them after they knew of the pendency of this suit, instead of furnishing a reason for exonerating them from the payment of interest, constitutes a strong inducement for charging them with it.

It is, moreover, manifest that this case is readily distinguishable from those in which it is necessary to go into a protracted, intricate accounting, in order to ascertain the true balance between the parties.

In T. & J. Kirkman et al. v. Vanlier et al., (7 Ala. 217,) it was held by our predecessors, and we think very correctly, that

where a bill is filed for the purpose of subjecting a sum of money in the hands of a third person, to the payment of a debt due the complainant, if such person, though enjoined from using it, does not offer to bring it into court, but insists upon his right to retain it, both as against the complainant and his debtors, he will be charged with interest. This decision is well sustained by the authorities cited in it, and as the case before us is clearly brought within its influence, we deem it unnecessary to cite further authority to the point.

But it is supposed that the frame of this bill will not justify a decree for interest, as it contains no specific prayer for the same. In general, a court will not decree interest on a balance, unless it is specially asked for in the bill, but this rule applies to interest due at the time the bill was filed. Where the interest accrues subsequently, it is the practice of the court, upon further directions, to order the interest to be computed, although there is no prayer in the bill to that effect. In Turner v. Turner, (1 Jacobs & Walker, 43,) Sir Thomas Plumer, Master of the Rolls, said, "for although the bill does not pray for interest, and there is nothing on the face of the pleadings to affect the executors with it, yet, it is, I think, now open to the court to charge it against them." And as to bringing the money into court, he says: "It was urged that no application was made for the payment of the balance into court, but the defendants should have brought it in without any." See also Loyd v. Jones, 12 Simons, 491, and Daniel's Ch. Pr. 439; ib. 1507.

Having disposed of this objection to the decree, which is taken by all the defendants, let us turn to the alleged error, which is severally assigned. We have carefully examined the additional proof taken by the register upon the last reference as to the bond of the company No. 78, which Mr. Cowles insists should be allowed as a credit upon his stock. The testimony of Mr. Gilmer tends to weaken to some extent the evidence adduced against him as to the time he acquired this bond, but his memory is unaided by any memorandum in writing made at the time, and besides, he cannot identify this as the bond deposited by Cowles with Bell to be credited on his stock. Without stating the testimony previously taken, which will be found in 15 Ala. 246, we feel constrained to hold that the proof clearly preponderates in favor of the master's report, and shows that this bond was

purchased from Wm. Knox on the 28th day of June, 1841, nearly one month after the bill was served upon the defendant Cowles. Consequently, the Chancellor very properly refused to allow it as a credit upon the amount due from him for stock.

This disposes of the errors assigned by the defendants to the bill, and shows that the Chancellor did not err in the matter of their objections to his decree.

Next we come to consider the question raised by the assignment of errors on the part of Allen et al., the complainants in the court below.

It appears that the subpœna in the cause was executed on Abner McGehee on the 26th day of May, 1841, and the register reports that said McGehee became the owner of three of the bonds insisted on as credits by him, two of them for $1,000 each, and one for $100, on the first day of June, 1841. According to this report these bonds could not have been allowed as sets-off against McGehee's indebtedness, but it was excepted to as to these items, and the chancellor sustained the exception and allowed McGehee the benefit of them.

The evidence in regard to these two items shows that on the 5th day of November, 1840, William McGehee, being the owner of these bonds, with other demands against the company, amounting in all, with interest to 1st November, 1840, to the sum of $6,701, and being indebted to Daniel Moseley in the sum of $3,000, to John Chaney in the sum of $900, to T. Baldrick in the sum of $500, and to the bank in the sum of $2,300, amounting in the aggregate to $6,700, (for the payment of which debts it appears that Abner McGehee was the security for William,) placed the above bonds and estimates in the hands of Abner, and took his receipt in the following words: "Received, 5th November, 1840, of William McGehee, the above demands, which I promise to try to collect and pay the following writs and executions, viz." Here follows a description of the debts above designated. It appears that the demand due Moseley, amounting to $4,177 15, besides costs and commissions, was paid by Abner McGehee to the sheriff of Montgomery County, on the 1st day of January, 1841.

The Baldrick debt was also paid by him for William McGehee, but at what time does not appear. The matter between William and Abner McGehee stood thus until the Fall of 1842,

when, according to the testimony of William, Abner told him that he had caused said bonds and estimates to be passed to his (Abner's) credit on the books of the Rail Road Company, but that he (William) could take the amount of said bonds, &c., in stock in said company, or if he preferred it, he would give William other bonds against said company. Nothing, however, was done in regard to the matter, until, in 1843, William being dissatisfied with the disposition made of the bonds and estimates by Abner, the parties agreed to submit the matters of difference between them to the adjustment of arbitrators, by whom it was awarded that Abner should account to William for said bonds and estimates at the rate of fifty cents on the dollar; and upon a settlement based upon such arbitration and award, William fell in Abner's debt to the amount of about $900.

It appears that the settlement or entries upon the books of the Rail Road Company, by which these two bonds were placed to the credit of Abner McGehee, was made on the 1st of June, 1841, after the service of the subpœna in this case upon him. It no where appears that he had any authority to use these bonds in settlement of his indebtedness to the company, unless such authority can be deduced from the receipt above spoken of, coupled with the subsequent payment by him of the Moseley and Baldrick demands.

We may then leave out of view the settlement, since we must look to the rights of the parties and their equities, growing out of the relation which they occupied towards each other at the time this bill was filed. The question then is, what interest had McGehee (Abner) in these two bonds at the time the lien of the complainants attached to his indebtedness to the R. R. Company?

It is clear that he had no legal interest, for there was no assignment of the bonds to him. Had he an equitable interest, and by this we mean such an interest as a court of equity would protect and enforce? He was certainly more than a mere collecting agent for William, as the written receipt upon its face would indicate. In arriving at the intention of the parties, we should construe the obligation imposed by the receipt with reference to the surrounding circumstances attending its execution, and the object intended to be effected by the parties. Abner was the security for William, and to provide the means to meet the demands so secured, William placed these bonds, &c., in his hands

to collect and pay them. It then became his duty to collect them as it was his privilege to apply the proceeds to the payment of the debts specified, for his own protection and indemnity. It was an agency coupled with an interest which William could not have revoked or affected, without first having paid the debts designed to be settled out of the proceeds. If Abner paid the debts due to Moseley and Baldrick before collecting the claims thus placed in his hands, he became subrogated to the rights of the creditor thus paid off, and retained the right to indemnify himself out of the proceeds of said bonds and estimates. But the payment by the surety would not give him the absolute property, either in law or in equity, to these bonds. They still belong to William, charged with Abner's right to collect and reimburse himself the amount paid. And, notwithstanding this arrangement for his indemnity, Abner had the right, immediately upon the payment, to sue William, and recover at law the amount which he had paid. This right, however, to sue upon the demand at law, does not affect his remedy to rely upon the security which he has; and whether William be solvent or insolvent is immaterial in this view of the case. The Rail Road Company is shown to be insolvent, and this proceeding in equity to collect the demand which Abner owes to the company but subrogates the complainants to the rights of the company in respect to such demands. The company being insolvent, it would be clearly inequitable to allow it to collect the whole of Abner's indebtedness to it, while he holds against it the right to reimburse himself the amount he has paid for William McGehee out of collections to be made upon these claims. As to all the debts mentioned in the receipt, except those due Moseley and Baldrick, we must presume William McGehee paid them, as there is no proof that Abner paid any of them, and no charge for such payment appears to have been brought up on the settlement based on the arbitration. Nor does it appear that Abner claimed any amount on account of the demands for which he was originally bound as security. In regard to all of the demands which William had placed in his hands, Abner was the mere collecting agent of William, except as to the amount required to reimburse him the sum which he paid as his security, with interest on that sum. As to this amount he held an equitable lien, and if the company or the complainants in the bill had re-

imbursed him the amount he had thus paid, he would, in respect of the balance, have had no right to insist upon it as an off-set to the amount due from him to the company; for, as to the remainder, he would have had no personal interest whatever. In equity, then, he can be said to be the owner only of so much of the demand as he had the right, had the whole been collected, to appropriate to his re-imbursement. And to this extent, under the previous decisions of this court, we think the court of equity might well afford him relief, (T., C. & D. Rail Road Company v. Rhodes, 8 Ala. 206, and cases cited; Donalson's Ex'r. v. Pope & Posey, 13 ib. 770;) but further than this we think the court should not have gone.

But it is insisted that the amount paid by Abner McGehee to Moseley and Baldrick was more than equivalent to the entire market value of the bonds and estimates placed by William in his hands, and that having treated them as his own in procuring a credit upon his stock by the consent of the company, he is only to be charged the market value of these claims. Such too appears to have been the principle upon which the arbitrators acted in 1843, for they allowed William only a credit, estimating said claims at the rate of fifty cents on the dollar, notwithstanding Abner had used them at par in the payment of his debt to the company.

It must be borne in mind that the complainants' lien upon Abner McGehee's indebtedness to the company attached *before* the allowance by the company of these bonds, &c., as a credit upon it, and consequently no arrangement which they may have subsequently made could defeat the equitable rights of the complainants. To divest the case of the embarrassment which these subsequent proceedings throw around it, we may regard Abner McGehee in possession of the bonds, &c., handed him by William, and that he is summoned to pay to the complainants what he owes to their debtor, the company. Let us suppose that he had brought the amount he was due in money into court, with the claims of William McGehee which he held, and the evidence of so much paid by him on the demands which these claims were intended to secure. The court, upon an inspection of the receipt which Abner gave, at once determines that these claims were designed for his indemnity and protection against these debts for which he is surety, and orders that he shall be fully indemni-

fied by being reimbursed any sums which he may have paid, out of his indebtedness, or, in the case supposed, out of the money which he brings into court. When this is done, and the balance of the money is appropriated to the complainants, it is manifest that complete justice will have been done between all the parties. Abner McGehee's equity extends to his indemnity, no further. It enables him to resist the payment of the amount on his indebtedness, which he has paid on the demands mentioned in the receipt to William McGehee, with the interest on that amount, but no more. Although William and the company agree, after the complainants acquired their lien, that these bonds and estimates shall be computed at fifty cents to the dollar, yet this agreement can have no such effect as to override the lien of the complainants which had previously attached. The subsequent agreement and settlement between William and Abner, whether regarded as a purchase of these bonds, &c., or as the ratification by William of the previous unauthorized act of Abner in procuring a credit on the books of the company upon his indebtedness to the amount of them, cannot disturb the equities existing between the complainants and Abner at the time the bill was served upon the latter, nor dispense with the application of the rules of equity which define the rights of the parties. See this case (15 Ala. 232,) and Wood v. McCain, (7 ib. 800.)

The surety is not to speculate upon his principal. If he compromise for less than the amount of the debt, he can recover no more from his principal than he actually pays. And if he undertakes the settlement of the debt, it is his duty to procure the discharge of the debtor upon the best terms he can obtain it.—Burge on Surety, 361; 14 Ves. Jr., 567; 2 Mylne & Cr. 361. If he holds in his hands means in trust for the payment of the claims for which he is liable, like all other trustees, he is not to make profit by his trust. If by payments, he acquires a lien upon the fund so deposited, he can take no advantage out of such fund beyond the principal and interest which he has paid. —Gordon v. Lewis, 2 Sumner's Cir. Ct. R. 143. To allow Abner McGehee to retain of the amount due from him *double* the amount he has paid out, upon the idea that bonds of the company could have been purchased for half their nominal amount, would be to violate the spirit of the above rules, and in effect to *make* a contract between him and William to the preju-

dice of the complainants which had no existence when the bill was served upon him. We repeat, that according to the facts disclosed by this record, all that Abner McGehee could claim when this bill was served upon him on the 26th day of May, 1841, was to retain in his hands, as if he had collected it from the company, an amount equal to the sum he had paid of the debts named in the receipt to William McGehee.

The subsequent acquisition of the entire interest in these demands against the company by Abner from William, does not, as we have said, affect the equities existing between the complainants and the defendants at the time the bill was filed. Abner must look to the company for such *after acquired* interest.

The case made by the record, and the matters assigned for error, will not justify relief to the extent which the principles settled by this opinion would authorize, as the errors assigned by the complainants in the bill go alone to the allowance of the $1000 and $100 bonds as a credit to McGehee. The decree, then, as to said Abner McGehee, must be reversed and here rendered, charging him, in addition to the amount heretofore decreed against him, with the sum these two bonds were allowed to extinguish of his indebtedness to the company, and interest on that sum, to be computed after the expiration of sixty days from the service of the subpœna upon him. As to all other matters the decree is affirmed.

Let the complainants in the bill recover their cost.

BREWER *vs.* BREWER & LOGAN.

1. Declarations or admissions against the interest of the party making them, that he holds as tenant or trustee for another, are admissible against him and those who succeed to his rights or estate.
2. A court of equity will decree the specific execution of a parol agreement to sell or convey land, notwithstanding the statute of frauds, when there has been such a part performance of the agreement that to refuse it would work a fraud on the party seeking its specific execution.

3. A vendee who has obtained the possession of land under a parol contract and in pursuance of its terms, and has paid the entire purchase money, is entitled in a court of equity to a specific execution of the contract.
4. T, being in possession of a quarter section of land to which he had a pre-emption right, agreed by parol with G. that G. should pay the whole of the entrance money to the government, and in consideration thereof should have one-half of the land. G. paid the entrance money accordingly, and took a patent in his own name. *Held*—That these facts were tantamount to a payment of the purchase money, and entitled T. to a specific execution of the contract.
5. When the specific execution of a parol agreement would be decreed between the immediate parties thereto, it will also be decreed between parties claiming under them, unless some controlling equity intervenes which would render it improper, according to the rules by which courts of equity are governed, to decree its specific exe-tion.
6. When a party purchases land in the possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights binding on his vendor, and he cannot set up the want of notice to protect himself.
7. When the complainant's conduct has not been the basis of the acts of the person through whom the defendant claims, and his silence has not misled any one, he will not be held to have forfeited his equitable rights by the mere failure or omission to assert them.

Error to the Chancery Court of Sumter. Tried before the Hon. J. W. Lesesne.

Thomas J. Brewer filed his bill against George W. Brewer and Benjamin F. Logan in the Chancery Court at Livingston. The bill alleges that in 1834 the complainant was in possession of a certain quarter section of land to which he had a pre-emption right; that being unable to pay the entrance money, his brother Geo. W. Brewer agreed to pay it for him, and let him redeem it when able; that Geo. W. accordingly paid the entrance money and took a patent in his own name, as assignee of complainant; that in 1835, complainant being still unable to redeem the land, agreed by parol with said Geo. W. that he might have one-half of said land in consideration of his having advanced the entrance money as aforesaid, and should convey the other half to complainant; that said Geo. W. accordingly gave his bond for title to one-half of the land, but never executed any conveyance,

though often requested so to do by complainant; that in 1843 said Geo. W. executed a conveyance of said land to one Maxwell; that Maxwell afterwards, by deed of trust, conveyed the same to Waldo Shearer and Philip S. Glover, who afterwards conveyed the same to one McGrew; that said land was also sold at sheriff's sale under execution against said Geo. W., and bought by McGrew; that McGrew afterwards, by quit claim deed, conveyed the land to Logan; that during all this time the complainant remained in quiet and undisturbed possession of said land, under said bond for title and parol agreement; that said conveyance to Maxwell was made without his knowledge or consent, and that Maxwell at the time of the conveyance knew of complainant's equitable title; that in 1846 one Wynn, the tenant of said Logan, made a forcible entry upon complainant and dispossessed him; that complainant recovered the possession of said land in an action of forcible entry; that said Logan afterwards instituted an action of trespass to try titles for the recovery of said land, and having the superior legal title recovered judgment against complainant; and that a writ of possession issued on said judgment which had been placed in the hands of the sheriff. The bill prays an injunction against the execution of the writ and to restrain further proceedings under the judgment, and for a specific execution of said parol agreement. Logan in his answer denies all knowledge of said parol agreement and requires strict proof of the same. He insists that he is a *bona fide* purchaser for a valuable consideration, without notice; that complainant having slept on his rights, ought not now to be heard to assert them against innocent purchasers.

The bond for title was exhibited with the bill, but there was evidence tending to show that it was executed in 1845, instead of 1835. A decree *pro confesso* was taken against Geo. W. His deposition was also taken, in which he admitted the parol contract, and the execution of the bond for titles in 1835. The chancellor dismissed the bill, holding that the bond for title was a forgery; that the deposition of Geo. W. Brewer was inadmissible on the ground of his interest; and that the other evidence in the case was insufficient to establish the parol contract.

R. H. Smith, for plaintiff in error:

An equitable title cannot be set up at law against a legal ti-

tle.—Cansey v. Driver, 13 Ala. 818. An equitable title will prevail against creditors or purchasers of one having only a naked legal title. It need not be recorded, and possession is equivalent to registration of a title deed, and a court of equity will interfere to quiet and perfect an equitable title against the vendor and his creditor.—Morgan v. Morgan, 3 Stew. 383; Harris v. Carterid, 3 ib. 233; McGee v. Eastis, 5 S. & P. 426; Toney v. Moore, 4 ib. 347; Burt v. Cassety, 12 Ala. 739, as to possession being notice. If complainant had no written evidence, he still has a right to a specific performance, his possession and improvement taking the case out of the statute of fraud. 4 S. & P., 347; Meredith v. Nash, 3 Stew. 207. Possession by the vendee is constructive notice of the conveyance, so as to defeat a subsequent purchaser.—Smith v. Zurcher, 9 Ala. 208; Hanrick v. Thompson, ib. 409; Farnsworth v. Child, 4 Mass. 641.

A subsequent purchaser is as much affected with notice of an equitable title, as of a legal one.—Burt v. Cassety, 12 Ala. 739; Clay v. Moore, 7 ib. 742; Williamson v. Bank at Mobile, 7 ib. 920.

Purchasers and creditors, by our registration acts, are placed on same footing.—Burt v. Cassety, 12 Ala. 739. As to specific performance, Mad. Ch. 288.

Equitable title prevails against creditors and purchasers of him who holds the naked legal title.—Morgan v. Morgan, 3 Stew. 386. Toney v. Moore, 4 S. & P. 347, was a verbal contract for sale of land, and the court decreed a specific performance. In Williamson v. Br. Bank at Mobile, 7 Ala. 906, Goldthwaite delivers a dissenting opinion. The court decide that the complainant did not lose her equitable title by omission to assert in chancery. The case of Green v. Harrison, 7 Ala. 585, was for personal property, and there then was a remedy at law by trial of the right of property. Equity will decree a specific performance of a contract, where it is in writing, is certain and fair, and is for an adequate consideration. The form of the contract is immaterial.—2 Story's Eq. 751-15; German v. Machim, 6 Paige, 288; Chilliner v. Chilliner, 2 Ves. 528; Ensign v. Kellogg, 4 Pick. 1; Sug. on Ven., ch. 4, p. 12.

A person contracts in writing to sell land, and refuses to perform his contract, and then sells the land to a purchaser with notice, the latter will be treated as trustee of the first ven-

dee.—2 Story's Eq. 784; Champion v. Brown, 6 Johns. C. 402. From the time of such contract for the sale of land, the vendor becomes a trustee for vendee, and every subsequent purchaser with notice becomes subject to the same equities. The vendor treated is in chancery as the equitable holder.—2 Story, 789-90.

When specific execution will be decreed against a party, it will be decreed against all claiming under him.—Ib. 788.

When one purchases real estate under circumstances which should put him upon inquiry as to the title of him whose interest he purchases, he stands in the same situation as if he had actual notice.—Harris v. Carter, 3 Stew. 233. And if a person other than the vendor is in possession, this should put the purchaser upon inquiry, and in legal effect will be equivalent to notice.—Smith v. Zurcher, 9 Ala. 210. Hanrick & Powell v. Thompson, 9 Ala. 409, does not conflict with the above authorities. Defendant must aver in his answer that he had not notice at the time of the purchase, nor at the time title was made to him—must state when he paid the purchase money, and must allege that vendor was only pretended to be seized in fee, and that he was in possession. Without these, he is charged with notice.—Moore v. Clay, 7 Ala. 750-1.

Huntington, *contra*:

1. The injunction will be dissolved when the answer denies the allegations of the bill.—Withers' Ex'rs v. Dickey, 1 Stew. 190; 3 S. & P. 284; Long & Long v. Brown, 4 Ala. 622; Dunlap v. Clements et al. 7 Ala. 539; 10 ib. 486. The answer of one of the defendants sufficient.—Dunlap v. Clements, 7 ib. 539. When the case presented by the bill does not contain sufficient equity, the injunction will be dissolved and the bill dismissed, and damages allowed.—Williams et al. v. Berry, 3 S. & P. 284; 10 Ala. 566; 10 ib. 596.

2. There is no equity in the bill—

For want of proper parties. No decree can be had against a purchaser without notice of a lien, unless his vendor, who was a purchaser with notice, is made a party.—Singleton v. Gayle, 8 Por. 270. The bill alleges that McGrew was a purchaser with notice, and alleges facts from which notice may be inferred to Logan; hence the necessity of McGrew being made a party defendant.—Harris et al. v. Carter's Adm'r et al., 3 Stew. 383;

Cullum v. Batre, ex'r, 2 Ala. 415; Walker et al. v. Br. Bank at Mobile, 6 ib. 452; Judson v. Emanuel et al., 1 ib. 598.

There is no equity in the bill on account of the negligence of complainant. A party who seeks relief in equity must show himself ready, desirous, prompt and eager, and time frequently becomes the essence of the contract, and negligence will always bar relief against a purchaser where the complainant has not shown that he had done all he could with as little delay as possible.—Goodwyn v. Lyon, 4 Por. 307 to 314-09; Milward v. Thanet, 5 Ves. 720; Guest v. Homfray, 5 ib. 818; Alley v. Deschamps, 13 ib. 224. The bill should have been filed, if not before, at the earliest possible moment after Geo. W. Brewer conveyed to Maxwell, or shown an excuse why it was not filed.—Johnson v. Johnson, 5 Ala. 90; Goodwin v. Lyon, 4 Por. 307; Steele v. Kinkle, 3 Ala. 352; French v. Garner, 7 Por. 549.

The bill must show an excuse for not filing, when third persons are acquiring an interest; because, if a party suffers the person holding the legal title to go on and sell, with a knowledge of such sale, he cannot afterwards be heard to urge the want of authority, and unless he acts with promptness, after acquiring knowledge of such sale, he cannot be heard to contest the want of authority.—Steele v. Kinkle, 3 Ala. 352; King v. Cantrol, 4 Ired. 251; French v. Garner, 7 Por. 549; Perkins' Ex'rs v. Winter's Adm'x, 7 Ala. 868; Johnson v. Johnson, 5 ib. 90.

The bill does not state that the complainant prepared and presented a deed to Geo. W. Brewer for said land, as the law requires of him.—Reid v. Davis, 4 Ala. 83.

The complainant in his bill relies mainly upon his equity as derived from the bond for titles. Of course, if the bond be fraudulent, the complainant has no equity.

DARGAN, C. J.—Thomas J. Brewer being entitled to a pre-emption right to the north-west quarter of section twenty-one, township eighteen, range one, west, according to the laws of Congress, did, in the year 1834, make proof of his claim to the register and receiver of the land office at Demopolis, who issued to him a pre-emption certificate in the usual form. But the said Thomas J. being unable to pay the government the purchase money, George W. Brewer, his brother, advanced the same, and the complainant assigned to him the certificate. A patent for

the land was subsequently issued to George W. as the assignee of Thomas J. Brewer. These facts are not controverted, and, I think, the proof establishes that the agreement between the two brothers was, that George W. Brewer should, after the issuance of the patent, convey to Thomas J. the east half of said quarter section, and in consideration that the purchase money was advanced by George W., he was to retain the other half to himself. In the year 1839, before George W. Brewer had parted with the legal title, he stated to James Curry that there was a bargain between him and his brother that he, George, *was to pay* the pre-emption money and have one half of the land, and his brother was to have the other half; and if his brother died, his family *would be* entitled to the east half of said quarter section. These admissions were made at a time, and under circumstances, that to my mind go far to show that they correctly describe the agreement between the brothers. Thomas J. Brewer was then lying sick, and George W. was leaving home with the view to be married; and they were *made for the purpose that Curry might be a witness to the agreement.* Under such circumstances there could have been no motive in misrepresenting the agreement, and as it had not been reduced to writing, it was certainly proper that it should be made known to others who could bear testimony to the contract. The truth of these admissions, too, is to some extent corroborated by the history of the case; for, as Thomas J. Brewer was exclusively entitled to the pre-emption right, it is scarcely probable that he intended to relinquish the entire benefit of it to his brother in consideration of his paying the government price, which amounted to about two hundred dollars, when the land itself was worth over a thousand, especially as Thomas J. was poor and had a family dependent on his labor for a support. Under such circumstances it is but reasonable to suppose, that it was the intention of the parties that some portion of the benefit of this right should be reserved to Thomas J., and that he should not be excluded entirely from all benefit arising from it. Taking then the admissions of George W. Brewer thus deliberately made, together with the character of the transaction, and the improbability that it was the intention of the parties that Thomas J. should be deprived of all benefit in the right of pre-emption which belonged exclusively to him, and my mind is fully satisfied that it was the agreement between the two brothers, that

Thomas J. should have the east half in consideration of his right of pre-emption, and that George W. should have the other in consideration of his advancing the money to pay the government. Nor can it be objected that these admissions are not evidence against George W. and those who claim under him, for the rule of evidence is, that the declarations of one against his interest, that he holds as tenant or trustee of another, are admissible against him and those who subsequently succeed to his rights or estate.—1 Greenl. Ev., § 189; Varick v. Biggs, 6 Paige, 323.

The next question that arises is, whether a court of equity would decree the specific performance of this agreement between the immediate parties thereto, in the absence of any written instrument evincing its terms? It cannot be doubted but that a court of equity will decree the specific execution of a parol agreement to sell or convey land, notwithstanding the statute of frauds, when there has been such a part performance of the agreement that it would work a fraud on the party seeking its specific execution, to refuse it; and I think I may safely say, that all the cases agree in this, that if the vendee has paid the purchase money and been let into possession under the agreement, this will be considered such a part performance as will entitle him to a specific performance of the parol agreement.—2 Story Eq., § 66, 67; Cummings' Heirs v. Gill, 6 Ala. 562; Meredith v. Nash, 3 Stew. 207; Hays v. Hall, 4 Por. 375. Indeed, it may be the rule that the taking of possession without the payment of the purchase money would be a sufficient part performance to justify the court in decreeing a specific performance. This question, however, I do not consider before us. But all doubt must be removed when the possession is taken under the contract and in pursuance of its terms, and the entire purchase money is paid, that this will be held a sufficient part performance to entitle the vendee to a specific execution of the contract. Applying this rule to the agreement entered into between Thomas J. and George W. Brewer, I feel no hesitation in saying that there has been such a part performance as will entitle the former to the relief which he seeks against the latter. The right of pre-emption belonged to Thomas J., and the agreement was that George W. should have the one half in consideration of his advancing the purchase money to the government, and that Thomas J. should have the other half in consideration of his right of pre-

emption. This must be considered as tantamount to the payment of the purchase money, for nothing more was due to George W. before he ought to have conveyed according to the contract, and I think the testimony conclusively shows that from the time of the agreement, Thomas J. Brewer has had the possession and control of the east half of said quarter section, and has also made some improvements thereon. This must entitle him to a specific execution of the agreement as against George W. Brewer. The principle, too, is well settled, that where the specific execution of an agreement would be decreed between the immediate parties, it will also be decreed between parties claiming under them, unless some other controlling equity intervenes which would render it improper, according to the rules by which courts of equity are governed, to decree its specific execution.—2 Story Eq. 96; Hays et al. v. Hall, 4 Por. 374. Thus, if one purchase lands with a knowledge of a prior contract on the part of the vendor, to convey them to another, he is affected by all the equities that bind the land in the hands of the vendor, and it is equally true that possession by the first vendee is notice in law to the second, although in point of fact he did not know of the character of the contract under which he had the possession. Thus, if a tenant has changed the character of his holding and agreed to become a purchaser, still his possession must amount to notice of his equitable title, and a subsequent purchaser is bound by it.—Sug. on Ven., 9th edit., vol. 2, side page, 291-2; 16 Ves. 249; 2 Sch. & Lef. 583; Smith & Co. v. Zurcher, 9 Ala. 208. Indeed, it may be safely laid down as an invariable rule, that if one purchase land in the possession of another without inquiring into his rights or the character of his possession, he is affected with all the equitable rights binding on his vendor, and he cannot set up the want of notice to protect himself, for seeing another in possession he was bound to inquire into the character of such possession.

It has, however, been strongly argued, that the silence and conduct of the complainant in not letting his claim be known at an earlier date, ought to preclude him from asserting it against Logan, who claims to have purchased the land without actual notice of the equitable title of the complainant for a valuable consideration. I cannot, however, discover in the conduct of the complainant any such positive act, or *such silence when he ought*

to have spoken, as should produce a forfeiture of his equitable title, or render it inequitable in him to assert it. He knew not of the conveyance to Maxwell at the time it was executed; besides, this deed was voluntary. Nor did he know of the conveyance by Maxwell to Shearer and Glover as trustees, at the time it was executed; and it may be remarked that this deed also was without consideration, moving from the grantees to the grantor, and I think the testimony insufficient to show that he was present at the public sale by the trustees when McGrew became the purchaser, and besides the fact that Logan purchased by a quit claim deed from McGrew, it is manifest that the complainant had no knowledge of this conveyance when it was executed. The acts or conduct of the complainant *have not become* the basis of the acts of any one through whom the defendant Logan claims, nor has his silence *misled any one;* he therefore cannot be said to have forfeited his equitable right, or through his act or omission rendered it inequitable or unjust now to assert it against George W. Brewer and those who claim under him.

Independent, therefore, of the bond for titles, and assuming that it was ante-dated, that its true date was in the year 1845, instead of 1835, I still think that the chancellor erred, and that the complainant is entitled to the relief that he seeks. We must therefore reverse the decree, and here render such decree as the court below should have rendered.

It is therefore ordered, adjudged and decreed that the injunction heretofore granted in this case be re-instated and perpetuated, and that the complainant, Thomas J. Brewer, be invested with the legal title to the east half of the north-west quarter of section twenty-one, township eighteen, range one, west, which said land is more particularly described in the pleadings, and that he be quieted in his possession thereof. It is further ordered and decreed that the complainant recover of the defendants, George W. Brewer and Benjamin T. Logan, his cost in this court, and said Chancery Court.

GAINES *vs.* HARVIN.

1. When the court below charges the jury that if they believe the evidence they must find for the plaintiff, the defendant seeking to revise the charge must either show that there was *conflicting* evidence before the jury, and that therefore the charge of the court invaded their province, or he must set out *all the evidence* in the record, that the Appellate Court may be able to determine whether the charge is sustained or authorized by it.
2. The statute conferring upon the registers in chancery power to appoint trustees in certain cases, (Clay's Digest, 350, § 33, and Pamphlet Acts of 1845-6, p. 16,) is not unconstitutional in vesting *quasi* judicial powers in officers who are not elected, commissioned and qualified as judges are required to be by the constitution.
3. *It seems*, that the proceedings of a register in chancery in the appointment of a trustee cannot be collaterally impeached.
4. Detinue may be maintained for the recovery of a slave who at the commencement of the suit was in the possession of a third person on hire, it not being shown that the hiring is of such a nature as would prevent the defendant from resuming the possession at pleasure.

ERROR to the Circuit Court of Marengo. Tried before the Hon. Geo. D. Shortridge.

A. R. MANNING, for plaintiff in error:

1. All the title of the plaintiff below was derived from the order or decree of a register, the mere clerk of a Chancery Court, and the statutes under which the register acted are void.

The people of Alabama, in forming their government, took great pains to keep the legislative, executive and judicial functions separate. Upon this point the constitution is remarkably emphatic. The mere declaration of this principle is made to constitute an entire article in two sections, of that instrument. (See Art. II.) Indeed, according to our American ideas, this distribution of the powers of Government is necessary to the prevention of tyranny. Judicial powers are vested in the courts only, and their independence of the other departments is intended to be maintained by a certain prescribed mode of electing the judges, by putting their offices during the terms mentioned in the constitution, beyond the reach of the General Assembly and

Governor, and by other provisions designed to have the same effect.—See Art. V, §§ 1, 12, 13 and 14. Justices of the peace are expressly provided for by section 10, of this article. None of these provisions apply to a register, and he is not in any sense a judge within the meaning of the constitution. His action upon matters referred to him by the chancellor, does not show him to be so, for that action has no effect, until, upon his report thereof, it is adopted and confirmed by the chancellor, and so becomes his.

But the statutes which undertake to authorize registers to substitute one trustee for another, to divest one citizen and devolve upon another the legal title to property, (all that title which alone the common law courts of the land can recognize,) deal with a register as if he were a judge, and do not require any confirmation of his act, and an appeal or writ of error for the revision of his decree would bring the cause from him directly into this court. The Legislature had no more power to confer upon him this high attribute of a court, and place him in such relations to the judiciary of the State, than it has to clothe with other judicial powers any minion of its own whom it may appoint, and pay, and remove at will. The violation of the constitution is the same in kind, though different in degree, as would be the creation by the General Assembly of a court of Star-Chamber or High Commission.

Again: the register not being a judge, or having a judicial capacity by the constitution, if he can be invested with it by statute, must put it on in the manner the statute prescribes, else he is no judge, and proceedings before him are *coram non judice*. In this case he did not give the notice prescribed, of his intended judicial action. And his precipitate appointment of a new trustee upon the very day of the application by one or two only of the several beneficiaries mentioned in the deed, gave no more title than would the act of any other unauthorized person.

2. The defendant below had acquired title to the slave sued for, by the statute of limitations. For the title of the trustee, Law, devolved on his administrator in 1835, to whom a right of action accrued about that time; (Mauldin, Montague & Co. v. Armistead, Adm'r., 14 Ala. 702) and the statute did not afterwards cease to run.—Ang. on Lim. (2d ed.) 205-6, 518 *et seq.*; Howell v. Hair, 15 Ala. 195; Lowe's Adm'r. v. Jones, ib. 545;

Mercer v. Selden, 1 How. U. S. R. 545; Demarest v. Wynkoop, 3 J. C. R. 129.

3. The slaves, when suit was brought, were in the hands of persons to whom they had been hired, and who, according to the decisions of this court, were purchasers of them during the term of the hiring. And detinue can no more be sustained against the person who let them to hire, after he had parted with the possession of them, than against one who had sold his entire interest in the property.—See 2 Stark. on Ev. 281, (Detinue.) "The gist of the action of detinue is the wrongful detainer at the date of the writ, and not the original taking of the chattel. It is generally, therefore, incumbent on the plaintiff in this action to show an actual possession by defendant, or a general controlling power over the chattel at the date of the writ."—Charles v. Elliott, 4 Dev. & Bat. 468.

It is upon the same principle that detinue cannot be maintained after the destruction or death of the chattel sued for.—Lindsey v. Perry, 1 Ala. 203.

W. M. Broooks, *contra:*

1. The register had the power to appoint the trustee. (Clay's Dig. 350, §§ 32 and 33,) and the power in this case was properly and regularly exercised.—See Pamphlet Acts of January, 1846, p. 16.

2. But if the appointment was irregular, it cannot be collaterally impeached.—Lewis v. Intendant of Gainesville, 7 Ala. 85; Davis v. Cox, 17 ib. 714.

3. It is to be presumed that the charge of the court was correct, unless the contrary is shown by the party complaining. All the evidence is not set out in the bill of exceptions, and this court cannot therefore determine whether the charge of the court was correct or not.

4. The property held in trust does not pass to the representatives of the trustee.—Moses v. Murgatroyd, 1 Johns. Chan. R. 119, 473. In this case the property was never in the possession of the trustee or his administrator. Can the administrator in such case claim title?

5. The law authorizing the register to appoint a trustee is constitutional. It is no invasion or exercise of judicial power; applies simply to the remedy for the assertion of vested rights. Heirs of Holman et al. v. Bank of Norfolk, 12 Ala. 416-17.

Again: it may be held that the register is an 'inferior court.' If this be so, his acts are valid, although he may not have been elected by the Legislature.

CHILTON, J.—This was an action of detinue to recover a negro woman slave called Sylva, by Harvin, the defendant in error, against Wm. M. Byrd and Wm. Burks, who, by consent, were discharged, and the claimant of the slave, who is the plaintiff in error, admitted to defend. The plaintiff below had a verdict, on which judgment was rendered in his favor. Upon the trial a bill of exceptions was sealed, from which it appears that the plaintiff below introduced as evidence a deed executed by Robert Sanders on the 12th day of January, 1832, to Gabriel W. Law, conveying to him the slave in controversy, with others, in trust for the daughter of said grantor, Sarah A. Kendrick, widow of the late Thomas Kendrick, to have and to hold for her use during the term of her natural life, without being subject to her disposal or the disposal of any future husband she might marry; the trustee to permit her to enjoy said property, but the same not to be subject to her debts, and in the event of her death, the trustee named was to be seized of the property for the use and benefit of the grantor's son and daughters who are named in the deed, share and share alike, to them and their heirs forever. The deed makes provisions of a similar character for the grantor's other children and some grand children, but for the sake of simplifying the matter we omit them. This deed was proved to have been duly executed in South Carolina, where the parties resided in 1832.

In the latter part of 1835, or first of the year 1836, Sarah A. Kendrick died, the trustee, Law, having previously departed this life. James Law, Sr., was appointed the administrator of the latter, and he having been removed, a successor to such administration was acting in that capacity, when the following proceedings were had before the register in chancery of the 4th district, namely: A petition addressed to the chancellor was exhibited by Wm. W. & Margaret J. Harvin, his wife, setting forth the execution of the above deed, a copy of which accompanies it; that the slaves described were brought, in 1834, by Mrs. Kendrick, to Marengo county, and while so possessed of the slaves she departed this life; that the trustee also became a

resident of said county and afterwards died; that petitioner, Margaret, is the only surviving child of said Sarah A., and that in 1842 she was lawfully married to said Wm. W. Harvin, and that they are the only persons interested in the estate of said Sarah. Wherefore they pray the appointment of another trustee in place of said Law, and suggest Wm. W., one of the petitioners, as a suitable person. The petition bears date the 27th October, 1846.

On the same day the register proceeded *ex parte*, to appoint said Harvin trustee to execute said deed so far as regards the property given in trust for Mrs. Kendrick, the order reciting that this portion of the deed alone remained unexecuted. The defendant objected to the reading of the transcript of this proceeding in evidence to the jury, first, because the register had no authority to make such appointment, and secondly, because no notice was given by the register of his intended proceeding. The objection was overruled, and the petition and order of appointment read.

The authority of the register and the regularity of his proceeding, are the only questions for our revision. Indeed, we may well confine our inquiry to the first branch of this proposition, namely, the jurisdiction of the register; for, if he may rightfully make the appointment, we apprehend it cannot be collaterally set aside.

We say this is the only matter proper for inquiry. Another question is attempted to be educed from the record, namely, the sufficiency of the proof to entitle the plaintiff below to a recovery. But the bill of exceptions raises no question of the kind. The circuit judge charged, it is true, that under the proof in the cause, the plaintiff was entitled to a verdict, but it is not shown that there was a conflict in the proof which would have rendered such a charge improper, or that the proof was of such character as would render the charge obnoxious to the objection that it was an invasion of the province of the jury. Presuming in favor of the correctness of the judgment and proceedings, we must intend that there was no such conflicting testimony. It would seem almost a truism, that to enable the reviewing court to pronounce upon the legality of a charge based upon *all the evidence* in a cause, and pronouncing what the court conceived to be the judgment of the law as predicated upon those

facts, the revising court must be put in possession of such facts, else there is no data upon which to found an opinion. In this case the bill of exceptions does not purport to set out all the testimony, nor does the charge purport to have been based alone upon that which is set out. We must, then, in conformity to our established rule, presume that the evidence would sustain the charge if it had been set out *in extenso*.

We have hitherto decided that where a party seeks to revise a charge like this, he must show one of two things, first, that the evidence was conflicting, and that therefore the court had no authority to give such charge, as its effect in such case would be to withdraw from the jury the consideration of the conflicting proof; or, second, the record must set out *all the proof*, so that this court may be able to determine whether the charge was correct as predicated upon it, either as being sustained by it on the ground of its sufficiency, or as authorized by it by reason of there being no conflict or dispute in regard to it. The record before us does neither, and it is consequently impossible for us to determine whether the court invaded the province of the jury in deciding upon the effect of doubtful or conflicting proof, or whether, if it was a case proper for such action on the part of the court, the decision was sustained by the proof. We therefore dismiss this part of the case, and turn to the consideration of the register's authority under our statute to appoint a trustee.

By the act of 1843, (Clay's Dig. 350, § 33,) it is provided, that "when any trustee shall die, on the application of any person interested in the trust estate to the register in chancery of the proper chancery district, it shall be his duty to appoint one or more trustees in the stead of such deceased trustee, as in case of the resignation of trustees: *Provided*, that the notice prescribed by law shall in all cases be given." The previous statute of 1829, (Clay's Dig. 581,) required a trustee who would resign his trust to give to all the persons concerned at least thirty days previous notice, but no notice is prescribed to be given in order to fill the vacancy. The act merely declares that "upon the resignation or removal of any trustee as provided for by this act, the Circuit Court of the proper county shall have full power, &c., to appoint another trustee or trustees in the place of the trustee so removed or resigning." By the fifth section of the same act, it is provided, that for the prosecution or defence of any suit in

any of the courts of this State, the court before whom such suit may be pending, may, on motion, appoint a trustee or trustees for the purpose of prosecuting or defending the same, in all cases where the same may be necessary.

By the act of 13th January, 1846, (Pamph. Acts, '45-6, p. 16,) it was enacted that when the trustee died, resigned, or failed or refused to act, or removed beyond the limits of the State, on the application of any person or persons interested in the estate to the register in chancery of the proper chancery district, it shall be his duty to appoint one or more trustees in the stead of such trustee: *Provided*, that the register to whom such application shall be made, shall cause twenty days notice in writing to be given to all persons interested in such trust estate, and in case of the non-residence of any or all of the parties interested in such trust estate, such register shall cause publication to be made in some newspaper printed in this State, for sixty days, stating the time and place when and where such application will be made and determined.

Mr. Manning has argued very ably before us that this law, vesting in the register the power to appoint trustees, violates the constitution of the State; that the power to divest one person of title and to invest another with it, is a judicial power, to be exercised by the judicial officers of the State elected in accordance with the provisions of the constitution, and that to hold that the Legislature may devolve this power upon officers whose tenure of office is not provided for by the constitution, but who may be created by and amenable to the Legislature, would open the door for the Legislature to claim and exercise *all* the powers of the government, which by the constitution are divided into three distinct departments, legislative, executive and judicial, and each confided to a separate body of magistracy. This argument would be conclusive, had the constitution contained a clause restricting the Legislature in providing remedies for existing rights, to the courts specifically named in the constitution. Such, however, is not the case. The first section of the fifth article of the constitution declares that "the judicial power of this State shall be vested in one Supreme Court, Circuit Courts to be held in each county in the State, and such inferior courts of law and equity, to consist of not more than five members, as the General Assembly may from time to time erect, ordain and co-

tablish." The mode of the appointment of the judges of the several courts and tenure of their offices is also pointed out.

We do not understand by this provision in the constitution, that it was the intention of its framers to deny to the Legislature the power to confide to ministerial officers who do not constitute a part of the judiciary, properly so called, many duties involving inquiries in their nature judicial. The practice of this, as of all other governments, having their executive, judicial and legislative departments separate and distinct, very clearly shows that in the administration of the laws, inquiries partaking of the nature of judicial investigations are confided to persons other than judges whose acts have never been questioned on constitutional questions. Auditors and commissioners appointed in certain cases and for specific but temporary purposes, commissioners of roads and revenue, or for the allotment of dower, the sheriff in executing writs of inquiry in certain cases, so also the masters in chancery, the commissioner of patents of the United States, and commissioners under the late act of Congress in regard to proceedings for the extradition of fugitive slaves, all perform duties in their nature judicial, but we have seen no case holding their acts to be unconstitutional. To hold all such acts as are performed by inferior officers void, because such officers have not been commissioned or qualified as the constitution requires judges to be elected and qualified, would be to unsettle the titles of the country, and to introduce a scene of confusion which would greatly disturb the public repose. Before we could be justified in producing such a result, by declaring such statutes void, we must be enabled to see in them a plain and palpable violation of the fundamental law. This we cannot discover in the statutes under consideration. They but furnish the *cestuis que trust* with the means for the trial of their rights by substituting a party to represent them in lieu of one who is dead, removed, or the like. The action of the register in chancery in the appointment of such trustee is not definitive of the rights of third parties disconnected with the trust; the newly appointed trustee can have no greater right in respect of the trust estate than the original trustee possessed. The appointment then is a matter in which the *cestuis que trust* and the trustee are alone concerned, and is not a judicial decision upon the conflicting title of adverse claimants to the property.

As to the fact that no notice was given, were we to concede that the question could be raised by a stranger to the trust, and that the action of the register could be collaterally called in question, still we are of opinion, that assuming as true what the order of the register recites and what the petition avers, that the petitioners are the only persons interested in the trust estate, so far as the trust remained unexecuted, there was really no person to whom notice was required to be given. All persons interested in the trust estate, (by which we understand the *cestuis que trusts*, or their representatives,) were before the register, which dispensed with the necessity of notice.

We have, after a careful examination, been unable to perceive any error in this record. The objection that detinue cannot be maintained because the property at the time the action was brought was in the possession of a third party on hire, cannot be sustained. Without deciding what effect this would have, did the record show that the hiring was of such nature as would prevent the defendant from resuming the possession of the property at pleasure, it is quite clear that it is no bar to the action merely to show, as is here stated, that the property was in possession of another on hire; *non constat*, it may have been for an hour for the performance of some temporary service, or the hiring may have been determinable at the pleasure of the defendant.

Let the judgment be affirmed.

HARRISON *vs.* HARRISON *et als.*

1. The law of the place of the parties' actual domicil must govern in all questions of divorce, without regard to the law of the place where the marriage was celebrated.
2. A decree of divorce regularly rendered by the proper tribunal in this State is not invalid because the laws of the State in which the marriage was celebrated do not allow a divorce *a vinculo matrimonii.*
3. A decree of divorce against a non-resident defendant, upon whom service has been perfected by publication in the manner prescribed

by the statute, is equally as obligatory upon the defendant as if he had been personally served with process, or had appeared and answered the bill.

4. When a wife abandons her husband in this State and removes to another State, and after the expiration of three years he files a bill against her for divorce, he may proceed against her as an absent defendant, although she has not resided in this State during the three years. The desertion with intention of abandonment, which is the cause of complaint, having originated here, it is immaterial where the defendant resides during the three years subsequent thereto.
5. A decree of divorce does not become ineffectual because the act of the Legislature confirming it is not passed at the first General Assembly of the State held after its rendition.
6. Nor will the decree be pronounced fraudulent in a subsequent proceeding in which it is collaterally attacked, on account of a misnomer of the defendant in the insertion of a letter as the initial of a middle name, the description being otherwise sufficiently accurate, and there being no allegation in the pleadings of such subsequent suit that she was not known or called by such name.
7. Nor will the decree be considered void for fraud when collaterally impeached, because the bill omitted to state a fact which would have been a bar to the relief sought.

ERROR to the Court of Probate of Dallas.

GAYLE & GAYLE, and BOYCE, for plaintiff in error:

I. The court below erred in admitting as evidence the Alabama divorce and proceedings connected with it.

1. Harriet Harrison is not Harriet *Y.* Harrison.—See Poynter on M. & D., 10, (Note F;) 2 Ecc. R. 121.

2. The insertion of the letter "Y" was fraudulent; the notice was by publication. Defendant could not answer bill by that name. It enabled complainant to withhold the proceedings of the Chancery Court of South Carolina, and to get a decree *a vinculo* without a division of the estate.—See Clay's Dig. 170, § 8; Poynter on M. & D., 11, Note.

II. The decree of divorce pronounced in Alabama is void,

1. Because of the want of personal service upon the defendant, Harriet Harrison. There was no proof of any personal service.—See 15 Johns. 141; 9 Mass. 467; 1 ib. 401; 4 Cow. 293; 13 Wend. 407; 2 Stew. 399; Ib. 445; 3 Ala. 552; 11 ib. 668; 5 Con. U. S. R. 34; Constitution of Ala., Art. 1, § 29.

2. Because the divorce was fraudulently obtained. The addition of the letter "Y" in the Alabama proceedings (if the Alabama bill was filed against the applicant at all) was intended to elude the applicant from answering the bill, for the purposes before stated.—See Clay's Dig. 170, § 8; Poynter on M. & D., 11, Note.

3. Because when Kirkland Harrison filed his bill in Alabama on the ground of three years voluntary abandonment, the applicant and the said Kirkland were separated by a decree of the Chancery Court of South Carolina, and had been for years before, and this fact the said Kirkland, well knowing it, concealed from the Alabama court *in fraudem legis*.—See 15 Johns. 141.

4. Because the applicant was married to the said Kirkland in the State of South Carolina, where the marriage tie is indissoluble, except by death. Marriage is a contract, and the *lex loci contractus* governs it.

The marriage tie is indissoluble in South Carolina.—See 2 Strob. L. R. 11; 1 ib. Eq. 387; 2 ib. 174.

Marriage is a civil contract, and the *lex loci contractus* governs it.—See 6 Ala. 765; 1 Black. Com. 345; 7 Dana, 185; 3 Hag. Ecc. 639; 13 Eng. Ch. R. 193; Story's Confl. of Law, § 226; 8 Ala. 48; 13 ib. 802; 17 ib. 636; 8 Wheat. 1.

5. Because the act of the Legislature of Alabama perfecting the divorce, is void as in violation of the first paragraph of 10th section of the 1st Art. of the Constitution of the United States.—See 1st par. 10th sec. 1 Art. Con. U. S.; 6 Cranch, 136; 7 ib. 164; 2 Dallas, 304; 4 Wheat. 695; 17 Johns. 195; 16 Ohio, 599; 1 Blackf. 220.

III. It is insisted by the defendants, that the remedy of the applicant was only by writ of error, or bill in chancery to set aside the Alabama divorce. This position is not maintainable—

1. Because a divorce or judgment may be attacked collaterally for fraud, or for want of jurisdiction of the person or subject matter.—See 2 Stew. 129; 15 Johns. 141; 16 Ala. 280; 8 Smedes & M. 505; 7 ib. 85; 2 Watts, 354.

2. Because the applicant was not a party to the proceedings.

IV. It is insisted that the decree in South Carolina is void for want of jurisdiction, because Kirkland Harrison was domiciled in Alabama, and his domicil was hers. Ordinarily this may be true, but in this case the argument will not hold—

1. Because Kirkland Harrison appeared in South Carolina and answered the applicant's bill, without objecting to the jurisdiction of the court.—See 2 Scam. 263-79; 4 McCord, 79; 3 McLane, 587; 4 Geo. R. 47; 1 Denio, 91; 1 Mason, 360; 2 Ecc. R. 13; 2 McLane, 473; 12 Ala. 90; 3 ib. 552; 10 New H. 61.

2. Because applicant was driven to her friends in South Carolina by the inhuman cruelty of Kirkland Harrison, and his conduct gave her a distinct residence and domicil.—17 Ala. 250.

3. If the South Carolina decree is good and valid, that too gave her (as against the Alabama divorce) a domicil in South Carolina.—See Fillimore on Domicil, 57 L. Lib. 27.

V. The decree was not presented to the ensuing Legislature, and therefore it is void.—See Clay's Dig. 171, § 10. The decree was rejected at the session of 1841-2, and we pledge ourselves to show it from the journals of the Legislature. This rejection was forever conclusive against the divorce.

Lapsley & Hunter, *contra*:

There is but one question involved, to-wit: was the divorce so radically defective that the Probate Court should have regarded it as a mere nullity, and decreed dower to the former wife? To determine this question, we would, in the first place, suggest these general facts and principles which protect the divorce and stand in the way of the objections made to it:

1. The divorce has the dignity not merely of a decree of the court of chancery, a court of general jurisdiction and our highest court of record of original jurisdiction, but also the dignity of being an act of the Legislature.—See Con. of Ala., Art. 6, § 13; Clay's Dig. 169, § 1.

2. This is not a direct proceeding in the same or an appelate or higher court, to set aside the divorce, but is a collateral attack in a proceeding for dower in an inferior court of special and limited jurisdiction.

3. When decrees and judgments are thus collaterally attacked, the strongest possible intendments are made in their favor.—16 Ala. 271; 10 Pet. 449; 6 Por. 219; 7 Cranch, 423; 3 Pet. 193; 6 Cranch, 267; 8 Pet. 8; 4 Scam. 364; 3 How. U. S. 340-41.

First, as to the jurisdiction of our Chancery Court. No proof *aliunde* being made, but the record alone relied on to sustain the

objection to the jurisdiction, the strongest intendments are made in favor of the jurisdiction.—2 How. U. S. 340-41-42. But there can be no doubt as to this jurisdiction.—See 2 Kent's Com. 106; 4 Wheat. 629.

As to the second objection, that the notice was by publication instead of personal service, it cannot be made in this collateral way.—16 Ala. 271; 10 Pet. 449. But if that matter could be looked into in this manner, the notice by publication was certainly sufficient.—See Clay's Dig. 352, § 5. Notice by publication in a divorce case is less objectionable than in other cases, for no judgment *pro confesso* is allowed; but full proof is required, as in cases of answer denying.—See Clay's Dig. 170, § 6; Ib. 352, §§ 44; Ib. 170, 5; 12 Ala. 369.

Thirdly, as to the indissolubility of the marriage. It was not indissoluble by the laws of South Carolina.—See 2 Kent's Com. 106; 4 Wheat. 629-96; Story's Confl. of L. 313, § 213. If the marriage were indissoluble in South Carolina, that would not prevent a valid divorce, when the parties had abandoned their domicil in that State and fixed a new domicil where the law permitted divorce.—9 Por. 9; 12 Ala. 54; 2 Kent's Com. 459; Story's Confl. L. 233-168-69-54, §§ 178-99, 280; 3 Martin, 60; 3 ib. 581; 4 ib. 649; 6 ib. 83; 9 ib. 573; 14 ib. 574; 17 ib. 517-605-6; 2 Burrow's R. 1077; 3 Wheat. 101; Wheat. Elem. of the Law of Nations, 199-200. Besides these general authorities, the following are cited as being precisely in point, and conclusive in our favor.—Story's Confl. of Laws, 350, § 230, A, 3d edit. published in 1846, but not in previous edition.—Dorsey v. Dorsey, 7 Watts, 350; Harding v. Alden, 9 Greenl. R. 140; Barber v. Root, 10 Mass. 260; McGuire v. McGuire, 7 Dana, 181; Cooper v. Cooper, 7 Ohio R. 528.

As to the the fourth objection, that the divorce impairs the obligation of the contract of marriage, we simply refer to 2 Kent's Com. 106; Dartmouth College v. Woodward, 4 Wheat. 629-96.

Fifth, as to the fraud alleged—first, it does not appear that any such question was made on the evidence in the court below. Secondly, fraud is never presumed, but must be clearly proved by evidence necessarily pointing to it. Third, the insertion of the letter "Y" and the omission to mention the South Carolina proceedings, so far from pointing of themselves (or by

the aid of connecting evidence) to a fraud, are merely collateral independent facts, which do not even tend to prove a fraud. As to the letter "Y," see Edmondson v. The State, 17 Ala. 199. As to the South Carolina decree, even if valid, it was wholly immaterial, unless pleaded by her in the chancery divorce suit. No actual knowledge of its existence on his part is shown; nor was he bound to disclose it, if he had known its existence, and if it had been material, because it was matter of defence to be set up by her.—See Adams v. McMillon, 7 Por. 73; Gould's Plead., p. 177, ch. 4, § 17; Chitty's Pl. 301; 1 Story's Eq., §§ 204-5-6-7; 9 Ala. 662. But the South Carolina decree was absolutely void for want of jurisdiction of the subject matter. Harrison's answer could not waive that.—See 7 Por. 37; 8 ib. 554. To show that her legal domicil was in Alabama, we cite Story's Confl. of Laws, 166, § 198; Ib. 57, § 46; 14 Martin's R. 574-78; 9 Bligh's R. 89-103-4.

As to Harrison's affidavit for publication—see 4 Hump. 346; 1 U. S. Dig. 590, § 13.

The marriage domicil is thus shown to have been in this State. That being so, it is clear the South Carolina court had no jurisdiction, but it was usurping a jurisdiction over a matter belonging exclusively to our courts.—See 1 Johns. 424; 11 Mass. 227; 7 Dana, 181; U. S. Law Mag., Nov. 1850, p. 295.

Most, if not all the objections now urged against the divorce, if they ever had any validity, should have been set up in the Chancery Court against the decree by which they are now concluded; they came too late, if there was no other objection.—See the case of Lampkin v. Heyer, Jan. Term, 1851.

It will be observed that no South Carolina decisions are in evidence; consequently those which may be read in argument can have no influence as proof of any peculiar law in that State.—See Inge v. Murphy, 10 Ala. 885; Bender v. Reynolds, 12 ib. 446-8.

DARGAN, C. J.—This was an application to the Court of Probate of Dallas, by Harriet Harrison, claiming to be the widow of Kirkland Harrison, deceased, and praying that dower might be allotted to her of the lands of the decedent. The application was dismissed, and the cause is brought before this court by writ of error.

The facts which give rise to the questions of law for our revision, are these: In 1828, Kirkland Harrison, the decedent, intermarried with Harriet Ellison, the plaintiff in error, in the State of South Carolina, where both the parties then resided and continued to reside until the year 1834, when they removed to this State with the view to make it their permanent home. In a few months, however, after residing in this State, the plaintiff left her husband and returned to the State of South Carolina, where she has ever since remained; but the decedent, her husband, continued to reside in this State until his death, which took place in the year 1850. In the year 1835, the plaintiff in error filed her bill in equity in South Carolina, alleging cruelty on the part of her husband towards her, and praying alimony, and to be protected in living separate and apart from her husband. A commission was issued from the Court of Chancery in South Carolina directed to commissioners in this State, and before them Kirkland Harrison answered the bill denying the allegations of cruelty, but made no objections to the jurisdiction of the court. It does not appear that he took any further notice of the suit, but she examined witnesses, and a decree was rendered in conformity with the prayer of the bill.

In the year 1839, Kirkland Harrison filed his bill in the Chancery Court of Dallas county against the plaintiff in error, in which she was styled Harriet Y. Harrison, formerly Ellison, alleging that she had voluntarily left his bed and board for the space of three years, with the intention of abandonment, and praying a divorce from the bonds of matrimony. This bill, however, took no notice of the decree that had been rendered in the State of South Carolina, and the plaintiff was made a party to it by publication only, without personal service, and it is stated in the affidavit of Harrison, filed to obtain the order of publication, that the plaintiff then resided in the State of South Carolina, and without the limits of this State. Upon proof of the marriage and that the parties removed to this State in the early part of the year 1834, and that the plaintiff in error left her husband in a few months thereafter and returned to South Carolina, where she had ever since remained, the chancellor decreed a divorce according to the prayer of the bill. This decree was rendered in July, 1841, and in pursuance thereof an act was passed by the Legislature of the State of Alabama, on

the 15th day of January, 1844, divorcing the said Kirkland Harrison from his wife Harriet. In the year 1845, Kirkland Harrison intermarried with Margaret Smith in this State, with whom he lived as his wife until his death, and had by her one child, who is now an infant. It also appeared in the court below, that by the laws of South Carolina, where the contract of marriage was celebrated between Kirkland Harrison and the plaintiff, the bonds of matrimony are indissoluble so long as the parties live, and for no cause can a valid marriage be dissolved by the courts of that State.

This being the law of that State, it is contended, first, that a marriage celebrated there cannot be dissolved in another State, although the parties have removed to, and become citizens of such other State, in which divorces *a vinculo* are allowed. I cannot doubt but that the law of the place of the actual domicil of the parties is to govern in questions of divorce, without regard to the law of the place where the marriage was celebrated; and if the laws of the place of the domicil allow of divorces for any cause, the injured party may obtain one, although the law where the contract of marriage was consummated would not allow it for any cause. This is said to be the settled doctrine of the American courts, by Judge Story, in his work upon the Conflict of Laws, § 230, and the decisions to which he has referred, and which have fallen under my observation, fully sustain his assertion.

In the case of Barber v. Root, 10 Mass. 265, the parties were married in Massachusetts, but afterwards removed and fixed their domicil in Vermont, and in the latter State the wife obtained a divorce *a vinculo* by a decree of the Supreme Court. The validity of this decree came in question before the Supreme Court of Massachusetts, and it was determined to be valid, notwithstanding the cause for which the divorce was granted in Vermont would not have been sufficient to authorize the divorce by the laws of Massachusetts; and in the opinion the principle was asserted, that the conduct and relative duties of the married parties, as well as the relation itself, must be governed by the law of the domicil of the parties, and not by the law of the place where the marriage was contracted; and even in annulling the relation, reference must be had to the law of the domicil, and not to the law of the place of the contract. In the case of Harteau v.

Harteau, 14 Pick. 181, the court said, that the place where the marriage was had seems to be of no importance, but we must look to the relation of the parties, as it subsists and is regulated by our laws, without considering under what law, or in what country the marriage was contracted. In the case of Dorsey v. Dorsey, 7 Watts, 350, the parties being citizens of Pennsylvania were married there, but afterwards removed to Ohio, where the husband deserted the wife, who returned to her friends in Pennsylvania, and in that State filed her libel for divorce. The libel was dismissed on the ground that the courts of Ohio *alone* had jurisdiction of the matter, as the parties had their actual domicil in that State at the time the offence by the husband was committed. Chief Justice Gibson, in delivering the opinion of the court, said, "that the law of the place of the marriage must necessarily be the law of the marriage, as to its primitive obligation; but except upon the principle of perpetual submission to its supremacy in all things, it is not the law of the contract for the determination of its solubility." Again: he said, "while the parties remain subject to our jurisdiction, the marriage is dissolvable only by our laws, but when they are remitted to another, it is incidentally remitted along with them." The same principle is asserted in the case of Maguire v. Maguire, 7 Dana, 181. But it is contended, that by the laws of England the courts of Alabama have no authority to dissolve a marriage celebrated in a country where such contract is indissoluble, and that these laws are to govern in determining this question. But upon an examination of the English authorities, it will be found that even they would compel us to hold, that when a marriage is dissolved by the proper tribunals of this State, and the validity of the divorce is brought in question in our own courts, it must be held valid, notwithstanding by the laws of the place where the marriage was contracted no divorces were allowed. In the case of Rex v. Lolly, Eng. Crown Cases, 240, the prisoner was indicted and convicted of the crime of bigamy. Upon the trial it appeared that he had been married to Ann Sevaia, in Liverpool, who was divorced from him by the Consistorial Court of Scotland, and after such divorce, he was again married in England to Helen Hunter. The case was argued before all the judges of England, and they held the conviction right, on the ground that no foreign tribunal could dissolve an English marriage

a vinculo matrimonii, for a cause for which it was not liable to be dissolved in England; and this case has been followed in the two subsequent cases of Tovey v. Lindsey, 1 Dow. R. 117, and McCarthey v. DeCaix, 2 Russ. & Mylne, 614. But in the subsequent case of Warrender v. Warrender, 9 Bligh R. 89, the parties were married in England, but went to reside in Scotland. They afterwards went to England and executed articles of separation. The husband returned and resided in Scotland; but the wife went abroad and never returned. The husband brought suit in Scotland for a divorce, on the ground of adultery; a divorce *a vinculo* was granted, and the cause finally came before the House of Lords of England on appeal, and the decree was affirmed on the ground that the courts of Scotland had jurisdiction to decree a divorce, the parties being actually domiciled there; and as the case came from Scotland, the House of Lords was bound to administer the Scottish law. Without at present undertaking to say whether this case can be reconciled with the case of Lolly or not, it is clear that upon the authority of the case of Warrender v. Warrender, we should be bound to hold the decree valid in this State, without regard to the question, how it would be considered in South Carolina where the marriage was contracted. For, if we admit that the courts of England would have disregarded the decree in the case of Warrender and Warrender, had it been drawn in question in *their courts*, yet even the English courts hold that in Scotland, where the parties resided and the decree was rendered, it must be held valid. If we then are governed by the English decisions, as the parties were domiciled in this State and the decree here rendered, we cannot refuse to give it validity, because by the place of the contract of the marriage, the marriage tie is *indissoluble*.

But I cannot give my assent to the case of Lolly and those founded upon it. It is true we must look to the *lex loci contractus* to determine upon the validity of the marriage, and also to ascertain the rights each party acquired in the goods or property of the other, possessed at the time of the marriage, or acquired during the time of their domicil there. But when they remove and acquire a new domicil and become citizens of another country, although they carry their rights with them, they do not, and cannot carry with them the *lex loci contractus*. They come

under a new set of laws, and they must govern themselves by them, and if they acquire new rights after their removal, the law of the domicil must govern and ascertain them. Thus, if a marriage is celebrated in a country where the common law prevails, the husband becomes entitled to all the personal property of which the wife was possessed at the time of the marriage; but if they remove to a country where the civil law prevails, and afterwards acquire property, the civil law, and not the common law of England, must furnish the rule by which the rights of the husband and wife must be ascertained in reference to such newly acquired property. So, on the other hand, if the civil law prevails where the marriage is celebrated and the parties reside, it will furnish the rule that will govern the rights that each party takes, by virtue of the marriage, in the goods of the other; but if they subsequently remove to a country where the common law prevails and there acquire property, the common law must govern in reference to it.—Story's Confl. of Laws, § 178. If the laws of the newly acquired domicil must govern the marital rights as to property acquired after the removal, why shall not the relation itself in reference to the future conduct of the parties be governed by the laws of their newly acquired home? The contract of marriage is unlike all others in this; unless it be annulled by law, the duties and obligations it imposes are never fully performed or ended until the contract is determined by death. If then a married couple shall remove from the place of their marriage and take up their abode in another jurisdiction, and one of the parties there violates all the duties and obligations of the contract, by what law, it may be asked, shall the injured party seek redress? Would the law of the domicil apply any other remedy for the wrongs committed within its own jurisdiction, than it would if the marriage had been celebrated there? I think all will answer, that the same measure of redress and the same remedy would be applied, as if the parties had been there married; and if so, to my mind it follows that the marriage relation itself must be governed by the laws of the domicil, irrespective of the laws of the place of the marriage; and if governed by the laws of the domicil, it must be *in toto;* and consequently if the marriage is properly annulled by those laws, it should be so considered all over the world. We constantly refer to the *lex loci* to determine the validity of a contract, and I will ask if we

should not refer to the *lex fori* to determine upon the validity of its discharge? Upon what principle can we say that the decree rendered in the case of Warrender v. Warrender is valid according to laws of Scotland, but invalid in England or elsewhere? If the marriage was legally annulled in Scotland, where the parties resided, it should be so considered every where else; otherwise, we introduce this state of things, a contract binding on the parties every where except in the place of their domicil, and there it is legally discharged and annulled. To my mind, it appears that the case of Lolly is inconsistent with the principle that governs in the case of Warrender v. Warrender, and that the one or the other of them will have to be ultimately overruled by the English courts; or, if not, many embarrassing questions and disagreeable consequences will flow from the conflict, which we shall escape by steadily adhering to the American decisions, which hold that the laws of the domicil of the parties must govern the relation of husband and wife, from the time they are domiciled at their new home, without regard to the laws of the country where they were married. We come, therefore, to the conclusion, that the decree rendered in Alabama is not invalid because the laws of South Carolina, where the marriage was contracted, do not allow of a divorce *a vinculo matrimonii.*

But the decree is assailed on several other grounds. It is urged that it is void because the plaintiff in error was not served with process personally, and also because it was not affirmed by the Legislature at the next session after it was rendered, and further, that it was fraudulently obtained.

Independent of our statute, it is certain that the decree would be void, because the plaintiff in error, who was the defendant to the bill, was not personally served with process, nor did she appear or submit to the jurisdiction of the court. But in this State, as in many others of the Union, if not in all, the Legislature has passed laws to enable a complainant to proceed against an absent or non-resident defendant, on whom personal service cannot be effected, by publication, when the cause of complaint originates in this State, (see Clay's Dig. 353-4, § 48,) and decrees rendered upon service by publication, in the manner prescribed by the act, unless controverted in the manner pointed out thereby, and set aside, are equally as binding and obligatory

upon the absent defendant as if he had been duly served with process, or had appeared and answered the bill. See Bank of Norfolk v. The Heirs of Holman, 12 Ala. 369; Glover v. Glover, 16 ib. 440. It has been, however, argued that the cause of action or ground of complaint did not originate or take place in this State, and consequently the court had no jurisdiction to render the decree. But the bill alleges, and the proof shows, as well as the decree itself, that the plaintiff in error removed with her husband to this State, and after living with him a few months here, she abandoned him and returned to South Carolina. The abandonment or desertion of the husband is the ground of complaint, and that took place in this State. Nor can we yield our assent to the argument that the plaintiff must have remained three years in the State after the abandonment in order to entitle her husband to proceed against her as an absent defendant. The desertion, with the intention of abandonment, must continue three years to entitle the injured party to a divorce; but if the desertion takes place whilst the parties have their domicil in this State, it is immaterial where the guilty party resides during the three years, whether in or out of this State, the ground of complaint takes place here.

Neither is the decree ineffectual because the Legislature of the State did not pass a law confirmatory thereof, at the next General Assembly of the State held after the same was rendered. It is made the duty of the party in whose favor a decree is rendered, to deliver to the Speaker of the House of Representatives, either by himself, his agent or attorney, a transcript of the proceedings and decree, in the manner directed by the act of 1820, (Clay's Digest, 171,) and the Speaker is to cause the record to be opened in the presence of the House, and the same to be read and proceeded upon according to the constitution of this State. But neither the constitution nor our acts passed in pursuance thereof prescribe the time within which the Legislature must act upon the decree to give it validity, and we cannot restrain or limit them to the session next after the decree is rendered, or hold the law void which they may pass confirmatory of the decree, because it was passed at a subsequent session.

The last objection is, that the decree was fraudulently obtained—first, because the bill describes the plaintiff in error by the name of Harriet Y. Harrison, when her name was Harriet, with-

out the addition of the letter Y, and without a middle name; secondly, because the bill omitted to state the proceedings and decree had in South Carolina, nor were they brought in any manner to the notice of the court.

It must be observed that no evidence was introduced to show the intention of the complainant in alleging the name of his wife to be Harriet Y. Harrison instead of Harriet Harrison, nor that the plaintiff in error was misled or injured by the insertion of the letter Y as part of her name. But the question arises solely on the fact, and the plaintiff seeks to avoid the effect of the decree, simply on the ground that she was christened by the name Harriet, without the addition of a middle name, and the bill was filed against her by the name of Harriet Y. We cannot say from this circumstance alone that the decree was fraudulent. The bill filed by Kirkland Harrison sufficiently described his wife to enable her at once to know against whom it was filed. She is described as Harriet Y. Harrison, formerly Ellison, and the place of their marriage is correctly given by the bill. If the plaintiff saw the publication made against her, she at once knew against whom it was filed. This at once would do away with the idea of intentional fraud, for if the letter Y had been inserted to mislead the plaintiff and to prevent her from contesting the bill and the decree that was rendered, the complainant would scarcely have given such a description of her as would, beyond doubt, have defeated the very purpose he had in view. But besides this, it is not even alleged in the pleadings that the plaintiff was not called or known by the name of Harriet Y. Harrison. It is not unfrequently the case that a middle name is given or assumed after the first is given, or that one becomes as well and as familiarly known by a name differing from his baptismal name, as he is by his true name. Whether the plaintiff in error may not, in the one or the other of these modes, have acquired the addition of the letter Y to her name is not negatived, either by proof or by the pleadings. The decree cannot be affected with fraud on this ground.

The only remaining ground on which the decree is assailed for fraud, is the omission to state in the bill the proceedings and decree rendered in South Carolina, by which the plaintiff in error was authorized and protected in living separate and apart from her husband, Kirkland Harrison. We must bear in mind

that we are not considering what effect a foreign tribunal or the courts of a sister State would give to the Alabama decree, the plaintiff in error not being made a party to the bill by personal service of process, but the question is, what effect is to be given to this decree by the courts of Alabama? and we have seen that inasmuch as the cause of complaint arose or took place here, and the plaintiff in error was made a party to the bill in the mode pointed out by our law, the decree is binding on her, although she resided out of the State and did not have actual notice of the suit. To hold otherwise would not only be productive of disastrous consequences, but it would be to deny to our Legislature the power to pass laws enabling the courts of this State to render a decree against an absent defendant, when he was not personally served with process, although the cause of complaint arose here, and the absentee is made a party to the bill in the mode prescribed by the Legislature. Such a proposition we could not sanction, nor do we suppose that it would be sanctioned by any court either of the United States or of England. As the plaintiff in error cannot object to the decree on the ground that she did not have actual notice of the suit, the question is narrowed down to this, is the decree to be considered void for fraud, when collaterally called in question, because the bill omitted to state a fact or a ground of defence that would have formed a bar to the relief sought by it? In the case of Talbott v. Todd, (5 Dana 190,) the Court of Appeals of Kentucky held that the mere omission, perversion or misrepresentation of the facts in a bill would not constitute fraud, or subject the decree to impeachment on that ground. We are satisfied with the principle announced in this case, at all events, when the validity of the decree is collaterally called in question; for, if we allow the truth of the allegations of the bill on which the decree is rendered to be contested, and the decree held for naught, if the facts are found untrue, we should take from it all binding efficacy, and open every question to litigation that has been adjudicated and settled by the decree.

Coming to the conclusion that the decree rendered in this State divorcing Kirkland Harrison from his wife, cannot be impeached for any of the reasons alleged in the pleadings, it becomes unnecessary to examine the important question, whether the decree rendered in South Carolina in favor of the plaintiff in error was

binding on her husband or not. That question may be hereafter presented in such a shape as to require its solution, but until then we shall express no opinion upon it.

There is no error in the record, and the judgment of the court below must be affirmed.

THE STATE *vs.* MOORE & LIGON.

1. A *scire facias* is the proper remedy in proceeding under the Act of February 6, 1843, (Clay's Dig. 515, § 39,) against an incorporated turnpike company for a forfeiture of its charter.
2. The jurisdiction of the superior courts cannot be taken away by mere implication.
3. The Act of February 4, 1846, (Pamphlet Acts, 44,) under which an incorporated turnpike company may be indicted for a failure to keep their road in repair, does not deprive the State of the right to proceed for a forfeiture under the Act of 1843.
4. In proceeding by *scire facias* under the Act of 1843, against an incorporate company, the *scire facias* should allege that the defendants procured the act of their incorporation, or that they accepted it, or acted under it.
5. The Solicitor of the circuit cannot, *of his own volition*, sue out a *scire facias* against an incorporated turnpike company for a forfeiture of their charter, but can only act under the direction of the Legislature, or of the Attorney General.

Error to the Circuit Court of Lauderdale. Tried before the Hon. Thomas A. Walker.

The Solicitor of the Fourth Judicial Circuit sued out a *scire facias* in the name of the State against the defendants, to show cause why a forfeiture of their charter should not be declared. The *scire facias* alleged that the defendants had been authorized by an act of the General Assembly of the State, approved February 3, 1846, to turnpike a certain road which is described, and that they had forfeited their charter, both by *misuser* and *non-*

user. The defendants demurred to the *scire facias*, and their demurrer was sustained.

Attorney General, for the State:

1. The main question before the court is as to the sufficiency of the *scire facias*. The only requisite of a *sci. fa.* is that it should contain the same certainty that a declaration must. It should simply state in methodical and legal form the plaintiff's cause of action.

Declaration at the suit of injured party against corporation, stating that the road was out of repair, &c., was held good.—Noyes v. Turnpike Co., 11 Verm. 531; Turnpike v. Boyde, 2 Harring. 315; Braden v. Berry, 20 Wend. 55.

2. *Scire facias*, at common law, was the proper mode where there was a legal existing body, capable of acting, but who had abused their power.

Information in nature of *quo warranto*, where there is a corporate body *de facto* only, but who from some defect in their constitution cannot legally exercise their franchise.—2 Kent. 312; 2 Bacon. Ab. (old ed.) 31 and notes.

The *scire facias* appears to deny this to be a legal existing body, capable of acting, but that it is a body corporate *de facto* only, and from non-compliance with the requirements of its charter it cannot legally exercise its franchise, and perhaps *quo warranto* would be the proper mode.

Notwithstanding this distinction between *scire facias* and *quo warranto*, we are not without authority to sustain a *scire facias* at common law against a corporation for a forfeiture of its franchise for neglect to perform the provisions of its charter, though never a legal existing body.—23 Wend. 234; 2 Ashmead, 379; 11 Verm. 431; 3 Dev. & Batt. 14; 8 Hum. 235; 1 Dougl. 282.

3. But we are not not dependant on the common law for our right to a *scire facias* against a corporation for misuser or non-user.—Clay's Dig. 515, § 39.

Non-performance of the conditions of the act of incorporation is deemed, *per se*, a misuser that will forfeit the grant at common law.—23 Wend. 205.

4. Has this statute, (Clay *supra*, act 1843,) been repealed by the act 4th Feb. '46, p. 44?

Admit that a proceeding under the act of 1843 was a criminal proceeding, how stands the case? Why, it may be contended that the enacting of a subsequent statute to the act of 1843 repealed by implication that act. But the law never favors the repeal of a statute by implication, unless the repugnance be apparent, or in their operation they be irreconcilable.—Smith's Com. 879; 3 Ala. 626. These statutes are not repugnant and irreconcilable, admitting them both to be penal statutes. The act of 1843 is not repealed.

Conceding a *scire facias* under the act of 1843, issued against corporation for abuse of their powers, purely a criminal proceeding, it created no new offence. To suffer a highway to be out of repair was indictable at common law.—Arch. Cr. Pl. 4, and Com. v. Wilkerson, 16 Pick. 175. A turnpike is a highway and indictable.

And it is a rule of almost universal application, that if a statute, fixing a penalty for an offence, do not either expressly, or by implication, cut off or repeal the common law punishment for the same offence, it is merely cumulative.—23 Wend. 244; 5 Por. 32; 5 Ala. 670; Arch. Cr. Pl. 2. The act of 1846 would be cumulative.

But the act of 1843, authorizing *scire facias*, is not a criminal proceeding, but a civil proceeding.—State Bank v. State, 1 Blackf. 272; Smith et al. v. The State, 7 Por. 494.

As to the objection that the corporation may be indicted, that will not be sufficient to hinder a forfeiture of the franchise.—23 Wend. 243-4.

Is this statute against the Declaration of Rights, Art. 1, § 11, which says, "no person shall be proceeded against criminally, by information," except, &c.?—State v. State Bank, 1 Blackf. 272.

If a *scire facias* be against the Declaration of Rights, a *quo warranto* must be also; the latter is as much a criminal proceeding as the former, yet the books abound with statutes of States giving *quo warranto* as the remedy by which the charters of corporations are surrendered for non-compliance. If the act of 1843 be unconstitutional, there would be no way to dissolve a corporation.

Non-compliance of any one of the provisions of the act creating the corporation will forfeit the charter. A franchise is a con-

tract as much as an individual contract. If feoffment be made upon lands upon condition of paying rent, for a failure to perform the feoffor may enter.—23 Wend. 205.

Here the entering of a feoffor is as much a criminal proceeding as *scire facias* to seize privileges or immunities (which belong to the Government) from corporations, for not complying with their contract.—23 Wend. 205.

R. W. WALKER and T. M. PETERS, *contra :*

1. The *sci. fa.* in this case was not issued "at the instance of the State," as required by the statute. It was not ordered by the Governor, the Legislature, the Attorney General, nor by the grand jury of any county through which the road passed. It was issued by the solicitor *mero motu.* It is contrary to public policy, to lodge a power, so grave in its character and so important in its consequences, with the solicitors of the circuits, to be exercised by them at discretion. Such a construction of the statute violates both its letter and spirit.

2. This proceeding is in its nature criminal, and the same strictness of pleading is required as in a penal action.—9 Wend. 373-4-5-7, and cases cited; 23 ib. 193, 215, 217, 221, 223, 230; 7 Watts, 181.

The *sci. fa.* is fatally defective, 1. Because there is no allegation that defendants accepted the charter, or that they procured its passage. 2. Because none of the facts relied on as grounds of forfeiture are stated positively, but all of them by way of recital, leaving every thing to mere inference, and being throughout so indistinct, uncertain and general, as not to be issuable. 3. Because it does not conclude *contra formam statuti*, which was essential, our statute on this subject applying only to indictments. See on these points, 1 Chitty Pl. 237 and notes, 373-4; 1 Chitty Cr. L. 231, and cases cited; 2 Lord Raym. 1363; 1 Salkeld 375; 23 Wend. 215, 221, 223, 254; 6 Ala. 664; 5 Dowl. & Ry. 13; 5 Greenl. 76; 10 Mass. 36; 9 Pick. 192; 5 ib. 168; 3 Cowen. 1; 1 Hawks. 192; Clay's Dig. 442, § 26.

3. Where the grantees of a charter have not complied with the terms upon which the franchise was to vest, there cannot be a judgment of forfeiture, and *sci. fa.* does not lie. *Quo warranto* is the only remedy. The former lies against a corporation

de jure, and the appropriate judgment is a forfeiture. The latter lies against a corporation *de facto*, and the judgment is ouster.—2 Bac. Abr. 482; 5 St. & P. 46-7; 6 Sm. & Mar. 599, (611-15;) 2 Ashmead, 349 (379;) Yelverton, 192.

4. The proceeding by *sci. fa.* is repealed by the act authorizing indictments against turnpike owners, and by the special provisions of this charter.—Acts of 1845-6, p. 44, 143; 15 Ala. 746; 5 Pike 595, (cited 1 Suppl. U. S. D. 1987-8;) 9 Bac. Ab. 226-8.

PARSONS, J.—If there has been a forfeiture of the charter, it is clear, under the statutes, that a *scire facias* is the remedy. The act granting this charter to the defendants contains this language: "That said road shall be commenced in one year, and finished and put in repair as required by this act in four years after the passage of the same, otherwise all privileges hereby granted shall be forever forfeited." The general statute, which is prior in date, enacts that, "It shall be the duty of the several solicitors in this State, in whose circuit any turnpike road may be located, to issue a *scire facias*, at the instance of and in behalf of the State, against any owner of said road, whenever the provisions of any law creating such franchise shall have been so violated as to forfeit the same, by misuser or nonuser, or when the said owner shall have done or omitted any act or acts which amount to a surrender of the rights, privileges or franchises conferred by the act authorizing the same."—Clay's Dig. 515, § 39. And the next section of the general act, in such cases, requires that the judgment of the court, when the issue is found for the State, shall be that the franchise is forfeited. It was the intention of the Legislature to make the *sci. fa.* the remedy in all such cases, and we think the object has been accomplished by language that admits of no controversy. The Legislature had clear power to prescribe such a remedy and such a judgment.

2. This charter enables the judge and commissioners of roads and revenue, for a particular failure to keep the road in repair, which is specifically stated in the act, to declare a forfeiture. But the Legislature used no language indicating an intention to take away the jurisdiction of the Circuit Court, and the rule is, that the jurisdiction of the superior courts is not to be taken away by mere implication.

3. There is another act, approved 4th February, 1846, under which the defendants might have been indicted and fined if they failed, after being authorized to charge toll, to keep their road in repair, &c. But it is evident that the last mentioned act does not deprive the State of the right of claiming and proceeding for the forfeiture, though it might be a reason for relying upon an indictment and waiving the forfeiture, but this is at the option of the State.

4. But we think the *scire facias* was wholly defective in one point and uncertain in others, and therefore we think the demurrer was properly sustained. The charter is a mere authority, and so expressed. If the Legislature had undertaken to compel the defendants to construct the road, upon the terms and conditions of the charter, we should have looked into the question of its power to do so. The charter is an authority which did not become a contract with, or binding upon the defendants, unless it had in some manner been accepted. If the *sci. fa.* had stated that they procured the act, or accepted it, or acted under it, the case would have rested upon a different foundation. But nothing of the kind is alleged, and consequently, according to all analogy and precedent, there was no cause of action stated.—Lil. Entries, 411. It is not necessary to pursue the *sci. fa.* further, with reference to its defects and uncertainties.

5. The counsel of the defendants argued that the solicitor of the circuit could not proceed in such a case as this of his own volition, but that he must move only at the instance of the State. This is clear from the language of the act. That the act was drawn in view of the common law, and stands in harmony with it, will appear by reference to that law.

In England, informations lay against persons for misdemeanors, and were, *in those cases*, criminal proceedings. The practice of filing them existed at the common law, and may be traced to the earliest periods. Informations for offences more immediately affecting the King, his ministers, or the State, were filed *ex-officio* by the Attorney General, while those in which a private individual was virtually the prosecutor, were placed on record by the King's coroner or master of the crown office. Each of these officers had, and the attorney general still has the power of thus accusing the subject at his discretion. But the statute of IV. and V. William and Mary, c. 18, reduced the coroner to a

mere ministerial officer, and the informations exhibited by him in the crown office were subjected entirely to the Court of King's Bench. Criminal informations at this day are of two kinds, (in England,) those fixed *ex-officio* by the attorney general, at his sole discretion, and those prosecuted by the coroner or master of the crown office, by leave of the court according to the statute. Chitty's Crim. Law, 843-4-5, where the authorities are cited. "A franchise is a royal privilege in the hands of a subject," and proceedings against individuals for exercising them without, or contrary to the King's grant, are, where the King alone is concerned, under the direction of the attorney general. The ancient writ of *quo warranto* was the remedy. This was the origin of informations in the nature of a *quo warranto* at the common law. These also are filed by the attorney general of his own authority, or by the King's coroner, commonly called the master of the crown office, formerly of his own authority, but since the statute of IV. and V. William and Mary, c. 18, under sanction of the Court of King's Bench.—3 Burr. 1616; Angell & Ames on Corp. 606. The statute of IV. and V. William and Mary is not in force in this State, and we have none like it that can possibly affect this case; consequently the discretion of the State to proceed or not to proceed for the forfeiture, is not placed in the hands of any of our courts, and it has already appeared that they cannot derive it from the common law. The *scire facias* to repeal the King's letters patent, for any cause of forfeiture that may have occurred, is analogous to the case before us. In that case also, there was a discretion to claim or to waive the forfeiture. In such cases, "previously to suing out the writ, a petition or memorial must be presented to his majesty, and a warrant obtained thereon to the attorney general, upon which he will grant his fiat for suing it out; but, it is said, that when a patent is granted to the prejudice of a subject, the King of right is to permit him, upon petition, to use his name for the repeal of it."—2 Tidd's Prac. 1094. The case before us, however, is one not affecting the rights of any particular individual. It is clear that the State here is the source of all such franchises, to be granted or withhold by the Legislature at its discretion. But if, under our law, a forfeiture must be exacted for every act done or omitted which, in strictness, is a cause of forfeiture, then our law is obviously defective; and it is

not only defective, but wrong, if this high discretion may be exercised by persons who, with regard to it, are not the representatives of the State. The language of the act plainly shows that the Legislature did not intend to confide this discretion to the solicitors; but, on the contrary, it was the manifest intention to withhold it from them. They were to act "at the instance of the State," which excludes the idea of their acting upon their own will or discretion. But I feel some difficulty in the question, who is to represent the State in this matter of discretion? It is clear that the Legislature may do so, but if the discretion is confined to the Legislature, the greatest abuses may exist for a serious length of time, before they can be redressed. This could not have been intended. The solicitors were to proceed "at the instance of the State." This language, which refers the discretion to no particular department or officer, was, however, used with direct reference to the common law, where, in the case of informations in the nature of a *quo warranto*, the attorney general held the discretion. The ellipsis in the statute may, therefore, be filled up from the common law, and the result is that the solicitor, in such cases, may proceed at the instance of the Legislature or of the Attorney General. In this view we are sustained by the opinion of a great American judge, who said, in the case before him, "But an information for the purpose of dissolving the corporation, or of seizing its franchises, cannot be prosecuted but by the authority of the commonwealth, to be exercised by the Legislature, or by the attorney or solicitor general, acting under its discretion or *ex-officio* in its behalf; for the commonwealth may waive any breaches of any condition expressed or implied, on which the corporation was created, and we cannot give judgment for the seizure by the commonwealth of the franchises of any corporation, unless the commonwealth be a party in interest to the suit, and thus assenting to the judgment."—Com. v. Union Ins. Co., 5 Mass. 230.

We do not decide that our Attorney General, as an officer of State, can derive his powers from the common law, but we decide, by construction of the act in reference to the common law, which the Legislature evidently had in view, that the Legislature intended to confer this high discretion upon him, to be exercised in its behalf justly and impartially.

The judgment is affirmed.

WRAY *vs.* WRAY.

1. Adultery committed by the wife when insane is no ground for a divorce on the application of the husband.

ERROR to the Chancery Court of Montgomery. Tried before the Hon. J. W. Lesesne.

THIS was a bill for a divorce by Albert G. Wray against his wife, Susan M. Wray, on the ground of adultery. The defendant in her answer denies the adultery. She also states that in 1843 she was afflicted with mental derangement, and was totally unconscious, for a period of six months or more, of everything that transpired around her; that since that time she has had frequent attacks of the same malady, and has in fact enjoyed but few lucid intervals; and that while suffering under this derangement she is entirely unconscious, as in the first attack, of everything that transpires.

The adultery is conclusively established by the testimony of several witnesses. A number of physicians were examined as to the mental condition of the defendant, and their evidence is somewhat conflicting. The seven physicians who were examined on the part of the defendant state their belief that she was deranged during the period when the adultery was proved to have been committed, but they differ as to the precise character and nature of the derangement. Three physicians testify in behalf of the complainant that they saw no evidences of insanity in the defendant, when occasionally visiting her professionally.

The chancellor held that the insanity was completely established by the evidence, and that it constituted a good defence. The bill was dismissed, and the complainant is now the plaintiff in error.

BELSER & HARRIS, and ELMORE & YANCEY, for the plaintiff:

1. As to the evidence sufficient to establish the adultery—see 2 Greenl. on Ev. 40, §§ 39, 40; Shelford on Mar. & Div. 220-21, (31 Law Library;) Poynter on Mar. & Div., (11 Law Library, 66-7.)

2. If the defendant was insane at the time of committing the adultery, her insanity was not of such a character as to prevent

her from distinguishing between right and wrong; and if she was capable of distinguishing between right and wrong, she is responsible for the consequences of her acts, and her insanity cannot protect her.—Roscoe on Crim. Ev., 949; McAllister v. The State, 17 Ala. 437.

3. Her insanity is no bar to a divorce at the suit of complainant.—Matchin v. Matchin, 6 Barr's (Penn.) 332.

MAYS, *contra*:

1. The adultery is not established by such evidence as will justify a decree for a divorce.—4 Por. 467; 4 Ecc. R. 415.

2. The insanity is proved beyond all doubt, and it is a complete bar to the relief sought. An insane person cannot commit adultery, or any other crime. There is no difference between the case at bar and a case where rape is committed on a married woman, or access is had to her by means of opium or some other soporific drug. All the arguments that apply to one case apply equally to the others.—7 Mass. 474.

PARSONS, J.—The time of the defendant's adultery with Prime commenced, according to the evidence, in July, 1848, and continued for several months. The question of fact is, was she insane during the whole of that time? There is so much evidence relative to this question, that a review of it is impossible within the limits of an opinion of the usual length. I shall consequently forbear comments upon the evidence in detail. Her case was certainly not one of monomania. But the difficulty of the question of fact has been increased by the various other diseases of body and mind under which she labored, at different times, during a period commencing some years before the time in question and continuing until afterwards, and probably to the present time. These diseases were puerperal insanity, hysteria and moral insanity. It is not necessary to determine whether or not her defence could be placed upon any or all of these, but as they afflicted her before the time in question, they are evidence conducing, with the other evidence in the cause, to prove that the state of insanity had ensued previous to the time to which the evidence of her adultery applies. After a full view of all the evidence, conflicting as it is, we are satisfied that the state of insanity, such as is manifested by the sufferer's delu-

sion or hallucination, had ensued before the time in question, and we are not satisfied that she enjoyed a lucid interval at any time afterwards. On the contrary, there is conclusive evidence of her insanity shortly after the time in question, and it probably continues to this time. We have carefully considered the evidence of her condition before and during the time in question and afterwards. Where clear and decisive insanity has been established at a prior time, acts of a doubtful character are of more force in proof of its existence at the time in question; and even subsequent decidedly insane acts may reflect back on acts otherwise equivocal.—Wheeler & Batsford v. Alderson, 3 Hag. 574. In her case there is evidence of insanity, as contradistinguished from puerperal insanity, hysteria, moral insanity and nymphomania, before and during the time which is material and afterwards. Several of the physicians call it a case of moral insanity. To us, however, it appears from a careful examination of every part of the evidence, that delusion belonged to it, and this we think was the opinion of the physicians, although not expressly stated. There is evidence of nymphomania subsequent to the time in question, but it was not necessary to mention that, for we do not place her defence upon it. The plaintiff's counsel relies upon her letters to Prime as containing intrinsic evidence that her mind was sound. With respect to her design, they show considerable consistency and continuity of thought, it is true. But in other respects they afford, to my mind, strong evidence of delusion. As to her consistency of thought in reference to her design, it should not be overrated. It was well observed by Sir John Nicholl, that "few madmen are so mad as to be incapable of some degree of self-control; and the cunning which madmen are often found to exercise, if bent upon carrying some favorite point, is a circumstance of the malady too well known to require any specific illustration."—Dew v. Clark, 3 Add. 79. Cases are mentioned by Lord Mansfield and by Lord Erskine which strongly illustrate the truth of Sir John's observation, but it is unnecessary to repeat them here, as the observation is generally known to be true.

2. Taking, as we do, the insanity as established, the question of law arises, whether the complainant is entitled to a decree for a divorce notwithstanding. A really insane person is criminally liable for no act whatever. The law as stated by Lord Lynd-

hurst, in a homicide case which was before him, is, "that the jury must believe, before they can acquit the prisoner on the ground of insanity, that he did not know when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature."—Rex v. Offord, 5 C. & P. 168. It is, however, true, as testified in this cause by one of the physicians of the lunatic asylum in South Carolina, that almost every insane person knows the difference, in the abstract, between right and wrong. In this respect they differ from idiots. But it does not follow that they are capable of acting on or of applying abstract principles to their own conduct. They may not be conscious of violating any law under the imagined circumstances or obligations of duty in which they are placed. They generally reason wrong by supposing facts or obligations of duty which have no real existence.

Had Mrs. Wray been indicted for the adultery, an acquittal would have been inevitable. But it must be conceded that an insane person is civilly liable for his trespasses. I do not doubt that. It is but just that the person whose misfortune has caused an injury to another should bear the loss; and, in the next place, the *quo animo* in such cases is immaterial. It was held in Massachusetts, that a husband was not entitled to a divorce on the ground that his wife had committed adultery when insane.—7 Mass. 474. But it was held in Pennsylvania, that the wife's insanity at the time of her adultery was no bar to the husband's libel for a divorce.—6 Barr's R. 332. I cannot assent to the latter opinion, although it was delivered by Chief-Justice Gibson. It is very true, that a legitimate off-spring is one great object of marriage, and that if a sane woman act so as to disappoint her husband's object and expectations in this respect, he is entitled to a divorce. In such case she is responsible for her acts and must abide their consequences. If the reasoning of Mr. Chief-Justice Gibson had stopped there, no one could object to it. But if we extend the principle upon which his opinion is chiefly founded to its necessary results, it will be found to be untenable, I think. It would entitle the husband to a divorce, if the wife should become unfruitful from disease, or if another man should gain access to her by force or fraud. In this case advantage was taken of her mental alienation, which can be the

cause of no forfeiture of her rights, any more than if a similar advantage had been taken by means of a soporific or of actual force.

As insanity itself is no cause for a divorce, nothing which is a consequence of it can be. The chancellor's decree is affirmed.

ROBERTS *vs.* THE STATE.

1. An indictment is defective which does not state *the time* when the offence was committed, and a demurrer to it on that ground should be sustained.

ERROR to the Circuit Court of Marion. Tried before the Hon. Sam'l Chapman.

THE defendant below was indicted for resisting process.

ATTORNEY GENERAL, for the State, admitted that the demurrer to the indictment ought to have been sustained.

COLEMAN, J.—The indictment in this case is defective in not stating any time at which the offence was committed by the defendant.

In The State v. Beckwith, 1 Stew. 318, it was held to be material in an indictment to lay a day when the offence was committed, and if the date be laid in blank, so that it does not appear whether the offence was barred by limitation or not, the judgment will be arrested. The principle here settled seems to have been questioned, in the case of the State v. Lassley, 7 Por. 526, but we think the decision correct. It is held by all the elementary writers on Criminal Pleading, that time and place must be added to every material fact in an indictment.—Arch. Crim. Pl. 46, and the cases there cited.

The court erred in overruling the demurrer to the indictment, and the judgment must be reversed.

JOHNSON *vs.* THE STATE.

1. A room in the second story of a two-story house, which is accessible only by means of a flight of steps leading up to it on the outside, and which is used by one of the proprietors of the house as a sleeping apartment, the lower room being used by the proprietors for retailing spirituous liquors, is within the prohibition of the statute against gaming at any store-house for retailing spiritous liquors, or house or place where spirituous liquors are retailed or given away.

ERROR to the Circuit Court of Barbour. Tried before the Hon. John D. Phelan.

P. T. SAYRE, for plaintiff in error.

ATTORNEY GENERAL, for the State, cited The State v. Terry et al. 4 Dev. & Bat. 186, and Commonwealth v. Saunders, 5 Leigh, 751.

CHILTON, J.—The defendant was indicted and convicted of playing at cards under the 8th section of the 6th chapter of the penal code, which provides that "if any person shall play at any tavern, inn, store-house for retailing spirituous liquors, or house or place where spirituous liquors are retailed or given away," &c., such person, on conviction, shall be fined, &c. The indictment contains two counts; one charges the playing at a store house for retailing spirituous liquors, the other count is for playing in a place where such liquors were retailed.

The proof was that the proprietors of the establishment for retailing had procured a house containing two rooms, one above, which was accessible only by means of a flight of steps leading up from without, which was used by one of the proprietors as a bed room, and the other, or lower room, was that in which the spirituous liquors were retailed. The playing took place in the upper room. And the question is, must we consider it within the prohibition of the statute?

We are of opinion that it comes both within the letter and the spirit of the prohibition. The upper story not only constituted a part of the house, but was used by the proprietors as an appendage to the prosecution of their business. We think the obvious design of the statute would be defeated, if parties could

evade the law by playing in a room other than that in which the retailing is carried on, but which constitutes a part of the same house, and is used by the same concern in the prosecution of their business.

The case in 5 Leigh 751, clearly shows that the party was properly convicted in this case. The object of the statute was not only to suppress the evil practice of gaming, but to disconnect it from tippling shops and houses where ardent spirits are retailed; and whether the gaming takes place in the room where the retailing is carried on, the one in which the parties keep their books, or that in which they or their clerks sleep, if connected with the same establishment and constituting an appendage, the party playing is equally guilty. No other construction could give effect to the statute, or prevent such evasions as would render it wholly inoperative.

Judgment of conviction affirmed.

ROQUEMORE *vs.* THE STATE.

1. An indictment for playing cards "*at a public place*" is sufficiently definite.
2. A back room occupied by the Register in Chancery as a bed-room, adjoining the front room, which was his office, and communicating with it by a door, *is not a public place* within the statute against gaming, it being shown that the house was surrounded in the rear by a high fence; that the playing took place at night, when the doors were locked and the windows closed; that the persons present, about eight in number, came by invitation from the occupier of the room, and that they entered through a back door, and not through the publice office.

ERROR to the Circuit Court of Barbour. Tried before the Hon. John D. Phelan.

P. T. SAYRE, for plaintiff in error:

1. The indictment is bad for uncertainty. The allegation is that

the playing took place at a public place, without designating the character of the public place.

The rule is, that where a general term is used in a statute creating an offence, in connection with words more precise and definite, the indictment must charge the offence in the particular words used in the statute.—The State v. Raiford, 7 Port. 101; The State v. Plunkett, 2 Stew. 11.

2. The nature of the public place should have been alleged in the indictment, so that the court could have determined whether it was a public place or not.—The State v. Turnipseed, 6 Ala. 667; The State v. Click, 2 ib. 26; The State v. Raiford, 7 Por. 101; The State v. Mayhew, 2 Ala. 340; The State v. Stacky, 2 Blackf. 289.

3. The indictment must contain a specific description of the offence.—Arch. Cr. Law, 53.

4. There are three sorts of public places: 1. Public places *per se*. 2. Public places created by statute. 3. Places made public by an assemblage of people. In order to convict the defendant, therefore, it was necessary to prove that the playing took place at some place which would come under one of the above descriptions of public places.

5. The proof is that the playing took place in a lawyer's office, at night, with closed doors, and a few invited friends present. It is precisely similar to the case of Clarke v. The State, (12 Ala. 492.) The object of the statute was not to prohibit card playing entirely, but to prevent it in certain places, where the example might be injurious.

6. The fact that the lawyer in whose office the playing took place, was also register, cannot change the aspect of the case. The office of register, it is true, is a public one, but the place where the books are kept is not necessarily public. In this case the office belonged to the register, and he for convenience kept the books there.

But the register swears that the front room was used as the law office, and as the register's office, and that the back room was used as his bed chamber.

But even if the fact of that building being used as a register's office constituted it a public place, it would only be public during business hours.

A bank is a public place during banking hours, but it would

scarcely be held that a room used by an officer of the bank as a bed chamber, after banking hours, or even before, would come within the prohibition of the statute against gaming.

ATTORNEY GENERAL, for the State:

1. The indictment in this case contains every thing which is required by the statute.—Clay's Dig. 433, § 11; Coggins v. The State, 7 Por. 265; Com. v. Butts, 2 Vir. Cas. 18; The State v. Atkins, 1 Ala. 180. The principle decided in 18 Ala. (The State v. Pennington, et al.) does not apply to this case.

2. Was the playing at a public place? It was at a lawyer's office, and also the office of the register in chancery.

There are two kinds of public places—one public of itself, the other made public by an assemblage of people. Every place where the people have a right to go is a public place, *per se*.—3 Leigh. Persons having business with the register in chancery have a right to go there, either in the night or day.

It may be contended that although the office of register and master in chancery might be a public place *per se*, in the day time and during business hours, yet at night it lost that character. The evidence no where shows when his business hours were. The law prescribes no particular business hours for this officer. He may have prescribed some for himself, and for that purpose preferred the night to transact chancery business.

Besides, this officer has conferred on him, by our statutes, the right to exercise many powers, which under the English chancery system belonged to the chancellor, or a court of chancery. To that extent the register is a chancellor, presiding over a court, which like the chancery court of England, was always considered open and in perpetual session. If so, how can the office of such an officer, (or court to some extent,) be any thing else than a public place *per se?*—Coleman v. The State, 13 Ala. 602; Walker v. Com. 2 Vir. Cas. 515; Windsor v. Com. 4 Leigh 680; Campbell v. The State, 17 Ala. 369.

COLEMAN, J.—The indictment in this case charges that the defendant played a game of cards at a public place, &c. The defendant insists that the place ought to be so described in the indictment that the court could determine whether it was a public place.

Without the aid of the statute it is probable the averment would be insufficient, but we think the indictment clearly sustained both by the letter and policy of the statute. By the 8th section, chapter 6th, of the penal code, it is enacted that "if any person shall play at any tavern, inn, store-house for retailing spirituous liquors, or house or place where spirituous liquors are retailed, or given away, or any public house or highway, or any other public place, or in any out house where people resort, at any game of cards," &c. Section 11, of the same chapter, declares, that on the prosecution of any person for gaming, against the provisions aforesaid, it shall be sufficient for the indictment to charge that the person so offending did play at cards, &c., in some of the places above specified. A public place is certainly enumerated among the places above specified, and thus it appears the statute has declared it shall be sufficient for the indictment to charge that the defendant played at cards in "a public place."

We think, however, that the court erred in charging the jury that the place at which it was proven the playing occurred was a public place. In the case of Clark v. The State, (12 Ala. 492,) the court decided that the office of a physician, where he exhibited his medicines, received professional calls at all times, and being unmarried, ate, and slept, is not a public place within the statute against gaming, the playing being at night, with closed doors, and a few friends present by invitation. In this case the playing occurred in the night time, in a back room, where C. Rist, the Register in Chancery, slept, which adjoined and communicated by a door, with a front room, which was the said register's office; that said back room was surrounded in the rear by a high fence, the doors were locked, the windows closed, and about eight persons present by invitation of Rist, and that these entered by a back door, and not through the public office. We consider a room in which every one having business has a right to enter, such as the register's office in this case, a public place; but his bed-room, where none had a right to enter, unless invited by the owner, was not a public place. I think the case above referred to, much stronger against the State than this, and the principle there held decisive of this case.

The judgment is therefore reversed, and the cause remanded.

UNDERWOOD ET ALS. *vs.* THE STATE.

1. In an indictment for camp-hunting, under the Act of February 5, 1846, (Pamphlet Acts, p. 134,) a count which only charges the defendants with *having formed themselves into a company consisting of more than five for the purpose of camp-hunting*, is fatally defective.
2. A count which charges that the defendants came into the county of Covington for the purpose of camp-hunting, and that they did camp-hunt therein, but does not allege that *they hunted together, or in a company of more than five persons*, is also defective.
3. The Act of February 5, 1846, does not prevent citizens of other counties from camp-hunting in the county of Covington, *except in companies consisting of more than five persons.*

ERROR to the Circuit Court of Covington. Tried before the Hon. E. Pickens.

BELSER & HARRIS, for plaintiffs in error.

ATTORNEY GENERAL, for the State.

DARGAN, C. J.—This indictment is framed upon a statute passed the 5th of February, 1846, entitled "An act to prevent the evil and pernicious practice of camp hunting so far as relates to the county of Covington." The first section declares that from and after the passage of this act, it shall not be lawful for any persons of said county to form themselves into companies of more than five at any one time for the purpose of hunting deer or any other game in said county, by camping therein; or for any other person or persons going to said county for the purpose of camp hunting. The second section prescribes the penalty for a violation of the act.

The first count of the indictment charges the defendants, (nine in number,) with having formed themselves into a company of more than five for the purpose of hunting deer in said county, by camping therein. We think this count clearly defective. The evil intended to be suppressed was camp hunting in the county of Covington in companies greater in number than five, and to constitute the offence the act must be done, that is, they must camp in the county of Covington for the purpose and with the design of hunting deer or other game. The first count mere-

ly charges the defendants with having formed themselves *into a company*, for the purpose of consummating the offence, but not with having actually committed it. It does not appear from this count that the defendants actually camped in Covington county for the purpose of hunting, nor even that they hunted at all. The mere agreement to camp hunt, without carrying that agreement into execution, is not the evil intended to be suppressed.

The second count charges that the defendants, not being citizens of Covington county, but residents of Pike county, did, on the first day of December, 1849, come to the county of Covington for the purpose, and did then and there camp hunt for deer in said county of Covington. This count does not charge the defendants with camp hunting together, *or in a company consisting of more than five*, and hence it is contended that it is defective. On the part of the State, however, it is insisted that as the defendants are not citizens of Covington county, but of Pike, they are equally guilty, whether they formed themselves into a company for the purpose of camp hunting, or each did the act separately and not in connection with any of the others; that it was intended by the Legislature to permit the citizens of Covington county to camp hunt so that they did not form themselves into companies of more than five, but that no one residing in any other county in the State could camp hunt in Covington county, whether he hunted alone or in a company composed of more than five.

We cannot agree with the Attorney General in his construction of the act. It would lead to this: if three or four citizens of Covington and one of Pike should camp hunt together, as they would not form a company of more than five, the citizens of Covington would not violate the act, whilst the citizen of Pike, who hunted with them, would be subjected to its penalties. We do not think the Legislature intended to draw distinctions between the citizens of different counties, or to permit citizens of Covington to do an act which would be an offence if done by citizens of any other county. The last clause of the first section is very obscurely drawn, but we are satisfied that the evil intended to be suppressed was camp hunting in Covington county in companies consisting of more than five, and to constitute the offence without regard to the residence of the offenders, whether

they are citizens of one county or another, it must be shown that they acted together, or in companies consisting of more than five. As the second count does not allege that the defendants acted together, or in a company, it is defective, and the judgment of conviction must be reversed.

HIRSCHFELDER *vs.* THE STATE.

1. The Act of February 7, 1850, (Pamphlet Acts, 51,) renders it unnecessary in a prosecution for trading with a slave *to aver in the indictment*, or to prove who was the master, owner or overseer of such slave, or to negative his assent to such trading.
2. The Act of February 7, 1850, which dispenses with the necessity of certain averments in an indictment for trading with a slave, is not unconstitutional.
3. Permission from the owner, or master, to sell goods to his slave not expressing the articles to be sold, is not such a consent as the statute requires, and furnishes no protection to the defendant.

Error to the Circuit Court of Conecuh. Tried before the Hon. E. Pickens.

Watts, Judge & Jackson, for plaintiff in error:

1. No person can be prosecuted in this State for any offence, except by indictment.—See Bill of Rights, sec. 12; Constitution of Ala., sec. 10, (Clay's Dig.,) and The State v. Middleton, 5 Por. 484.

2. An indictment is a brief statement of the "nature and cause of the accusation;" or, in other words, an indictment is a brief logical statement of the facts and circumstances constituting the offence charged.—The State v. Middleton, 5 Por. 484; Arch. Crim. Pl. 25-38.

3. Every indictment must show on its face the facts, in the doing or not doing of which the offence consists, and must charge the facts fully, directly and expressly; or in other words, every indictment must show on its face that some offence known to the

law has been committed.—Turnipseed v. The State, 6 Ala. 664; Brown v. The State, 4 Por. 410; Williams v. The State, 15 Ala. 259; Hirschfelder v. The State, 18 Ala. 112; Arch. Crim. Pl. 36 to 46 and 48.

4. This indictment charges no offence against the law. Mere trading with a slave is no offence. It is lawful to trade with slaves with the consent of the owner, master or overseer, expressing the articles to be sold or bought. The offence is the trading with the slave without the consent of the owner, master or overseer. The absence of consent is therefore the very essence of the offence, and this absence of consent must be charged in the indictment. Exceptions contained in or incorporated with the enacting clause of the statute, must be negatived.—Arch. Crim. Pl. 48; The State v. Saunders, 9 Por. 326; The State v. May, 9 Ala. 167. See particularly what Judge Ormond says in this last case, as to the offence under this statute for peddling without license. The name of the owner, master or overseer must be alleged.

5. But it is contended by the State, that the statute of 1850 (Pamphlet Acts, 51,) dispenses with the necessity of charging the want of consent of the master, owner or overseer, and also the name of the owner, &c. (*a*) In reference to this, we say, first, that this statute says, on the trial of any person indicted for trading with slaves, as now provided by law, it shall not, &c. A trial is the examination or investigation of an issue, either in fact or law. The finding or framing of an indictment by a grand jury is an *ex parte* proceeding, and cannot in any sense of the term be said to be a trial.—Bouv. L. Dic. 580; Black. Com., (3 book, ch. 22, mar. p. 330;) and, secondly, the statute says, that on the trial of any person indicted for trading with slaves, as now provided by law. If indicted as provided by law, before the passage of the statute of 1850, it must have been alleged that the trading was without the consent of the owner, master, or overseer; and the name of the master, owner or overseer must have been alleged; and thirdly, we insist that the statute never intended to change the form or constituents of the indictment. The only word in the statute which would remotely indicate such an intention is the word *aver*. If the word aver is used to express the idea that no charge or allegation in the indictment, of a want of consent of the owner, &c., or the name of

the owner, &c., is necessary, then the statute is inconsistent with itself, and look at it as you will, it presents the most ridiculous and glaring contradictions and absurdities. But the word *aver* does not necessarily mean a charge or statement in the indictment. It is used as synonymous with the word *prove*. If it does not mean this, the statute is nonsensical. Webster defines aver (from the French *averer*) to affirm with confidence, to declare in a positive manner; and he defines averment, in pleading, an offer of either party to justify or prove what he alleges; verification, an establishment by evidence. Ainsworth, in giving the corresponding Latin word for averring or averment, gives *confirmatio, probatio, testimonium*. Boyer, in stating the corresponding French words, for averment, gives, *verification, preuve*.—See Bouv. L. Dic., tit. Aver. 157. The word *aver*, then, is used as equivalent to *prove;* otherwise the sentence cannot be grammatically construed. The word "or," between aver and prove, should have been "nor," to sustain the position assumed by the Attorney General.

6. The indictment then is defective in not alleging the name of the owner, master or overseer of the slave; or, if unknown, in not alleging that fact. The owner, &c. must be alleged in the indictment, otherwise the defendant cannot make his defence, cannot know how to defend.

7. Unless the meaning contended for is given to aver, then we say the statute is unconstitutional. Our Bill of Rights provides that no person shall be prosecuted, except by indictment.—See Bill of Rights, defined in The State v. Middleton, *supra*. What is an indictment? It is a brief statement in writing of the facts which constitute the offence. It is no indictment in contemplation of law, unless it shows on its face that an offence has been committed.—The State v. Phil, 1 Stew. 31. The Legislature cannot dispense with the necessity of an indictment, in any prosecution for an offence. Can the Legislature dispense with the necessity of charging the constituents of the offence? Can the Legislature dispense with the necessity of charging the offence in the indictment? If it can do this, then it might dispense with the indictment itself, the indictment being but a statement of the facts constituting the offence.—See The State v. Middleton, *supra*.

8. If courts can give a construction to a statute, consistent

with the constitution, they will do so; they will not lightly presume that the Legislature has violated the constitution. It therefore becomes the duty of the court so to construe the statute as to make it harmonize with the constitution, if possible. By the construction here contended for, we make the law and the constitution harmonize, and it can be done in no other way; in no other way can we avoid the inconsistencies and absurdities of the statute itself.

9. The charge of the court, as shown by the bill of exceptions, is wrong. A verbal permission given by the master, expressing the articles in general terms, is a sufficient protection under the statute.

Attorney General, for the State:

1. The Act of 1850 dispenses with the necessity of averring the name of the owner, master or overseer of the slave, or that their assent was not obtained.—See Acts, 1850, p. 51, sec. 1.

2. There were two modes of proceeding against a party charged with the commission of an offence, by information and by indictment. The 12th section of the Bill of Rights merely takes away the proceeding by information, and leaves all the other modes of proceeding known to the common law. The only other mode was by indictment, and to that extent only is it sanctioned by the constitution. The proceeding by indictment is not expressly recognized by the constitution, but stands in every respect as it stood at the common law, and the Legislature has the right to alter the requirements of an indictment; and so the party indicted is "informed of the nature and cause of the accusation," that is sufficient.

3. The general permission to trade, proven in this case, is not sufficient.—The State v. Hurt, Jan. Term, 1851.

CHILTON, J.—This was an indictment for trading with a slave. The indictment charges that the plaintiff in error, at a certain time and place therein specified, "did sell to a negro man slave named Ben certain commodities, to-wit, one bowl, of the value of twenty-five cents, and one set of plates of the value of fifty cents, contrary to the statute in such cases made and provided," &c.

It is objected to this indictment, that it fails to state the constituent elements of the offence, in that the name of the owner of

the slave is not stated, and that it is not averred that the commodities were sold against the consent of the master, owner or overseer, &c.

By an act of the Legislature, passed the 7th February, 1850, (Pamphlet Acts of 1850, p. 51,) it was enacted, "That hereafter, on trial of any person indicted for trading with a slave, as now provided for by law, it shall not be necessary, in order to conviction, for the State to aver or prove who was the master, owner, or overseer of such slave; nor that the leave or consent was not given," &c. In the absence of the statute just quoted, this would clearly be a bad indictment. But we entertain no doubt that the statute was designed to remedy the defects which otherwise would have existed in the failure to discribe the owner and to negative the consent of the master, owner, or overseer.

After a careful consideration of the statute, and the construction contended for by the counsel for the plaintiff in error, we are satisfied that its effect is not to be restricted to the proof to be made upon the trial before a petit jury, but that it extends and was designed to apply also to the indictment. By the terms, "on the *trial* of any person," &c., we must understand the *prosecution* of any person, the word "trial" being used in its comprehensive sense, as embracing all the proceedings down to the acquittal or conviction of the party. But it is supposed that the remaining portion of the clause, namely, "indicted for trading with a slave, as now provided for by law," &c., shows that that the indictment must contain the same averments as were required under the previous act, and that this statute had relation alone to the proof. We do not think that such was the intention; for, if we give the sentence this meaning, we render a substantive and important portion of the enactment wholly nugatory. We allude to the subsequent part of the same clause, which says, "it shall not be necessary to *aver* or prove," &c. We think the meaning of the act is simply this, that in prosecutions against any person who may be thereafter indicted or proceeded against for trading with a slave, as that offence at the time of the enactment was defined or provided for by law, it should not be necessary to aver in the indictment or prove who was the master, owner or overseer of such slave, nor to negative their assent to such trading. The position that "aver" and

"prove" are synonymes in their collocation in this enactment, cannot be supported. True, the term "aver," compounded of the intensive syllable, *a* or *ad*, and *verus*, true, signifies to bear testimony to the truth; or rather, to aver, is to express the truth of a declaration unequivocally.—Crabb's Eng. Syn. But when we speak of prosecutions by indictment, and say that it is unnecessary to aver or prove certain matters, we at once understand by the averment that the allegation of such matters is dispensed with *in the pleading*, and it requires no proof of them to warrant a conviction. We must understand the term, aver, to signify what it usually means in the connection in which we here find it; and thus understood, we have no doubt but that the Legislature were endeavoring to cut off the chances of escape of those who might violate the law against trading with slaves, by rendering certain averments in the indictment, otherwise essential, unnecessary; and not being necessary to be averred, they need not be proved. The contrary construction would present the anomaly of requiring that the indictment should charge an affirmative fact essential to its validity, but which it was unnecessary to support by any proof. Such, for example, as the ownership of the slave.

But it is argued that if the effect of the statute is to dispense with these averments in the indictment, it is opposed to the constitution of this State, which substantially entitles the accused to demand an indictment, before he can be put on his trial for any indictable offence, unless in the cases excepted in the constitution, to which the case before us does not belong. We think the counsel misconceive the effect of the statute. It was certainly competent for the Legislature to enact that every person who should trade with a negro or mulatto should be liable to indictment, and should be fined on conviction, &c., unless the party so indicted should prove that the negro or mulatto was not a slave, or that being a slave, such trading was had by the permission of the master, owner or overseer. This is the effect produced by the statute on the former law. It makes the offence of trading with slaves indictable, leaving the exception as to the consent of the owner, overseer or master, to be proved by the defendant. And, although the indictment must charge the trading to have been with a slave, yet the owner's, overseer's or master's name need not be stated. This indictment, then, does

conform to the common law rule in describing the constituent elements of the offence, leaving the defendant to bring himself within the exception, by showing that although he traded with the negro man slave, named Ben, as charged in the indictment, yet he did so by the leave or consent of the master, owner or overseer.

The consent proven in this case, which does not express the articles to be purchased, is not such as the statute requires, and furnishes no protection to the accused.

After the best consideration we have been able to give this case, we are unable to see any error in the record, and the judgment must be consequently *affirmed*.

NUGENT *vs.* THE STATE.

1. The City Court of Mobile has power to *originate* criminal proceedings at a special term.
2. An objection to the Grand Jury by which an indictment is found, can only be taken by plea in abatement.
3. An indictment which alleges "that J. N., late of said county, in and upon one H. S. (she, the said H. S. then and there being a female child under the age of ten years,) feloniously did make an assault, and her, the said H. S. then and there feloniously did abuse *in the attempt carnally know*," is fatally defective in not specifying with sufficient certainty and precision the person upon whom the attempt was committed.

ERROR to the City Court of Mobile. Tried before the Hon. Alexander McKinstry.

CAMPBELL, for the plaintiff in error:

1. The Criminal Court of Mobile County cannot at an adjourned term originate an indictment against a prisoner under its original charter.—Acts 1846; 5 Mass. 435; Clay's Dig. 292, § 20-1; 6 Wheat. 106.

2. The Circuit Court had no authority, under the statutes of this State, to hold a special term for the finding of indict-

ments, and trial of prisoners, without their consent as shown by an application to the judge on their behalf.—Clay's Dig. 293, § 24, 26; ib. 454, § 26; 2 Pike's Ark. R. 251.

3. The grand juries summoned under the Penal Code (Clay's Dig. 454) apply to the cases in which the prisoner may call for a trial. The power to hold special terms for the trial of criminal causes under the act of 1807, was repealed in 1826. Special adjourned terms are confined to the civil docket by the act of 1826.

4. If the court should hold that a special adjourned term, for the despatch of business, allows the finding of a bill of indictment and trial, the court must be organized in accordance with the act.

5. The indictment is fatally defective. It is not a full, direct, nor express description of the offence mentioned in the statute.—Reavis' Dig. 399, § 208; The State v. Halder, 2 McCord, 377; Hawkins' Pleas, 343, § 111.

6. A court held at a time not allowed by law is illegal, and its proceedings are *coram non judice*.—1 Ala. 351; 2 Scam. 227.

Attorney General, for the State:

1. Does the omission of "to," which, according to strict grammar, should have been prefixed to the word "know," as the sign of the infinitive mood, vitiate the indictment?

Every indictment should be deemed sufficient, which, in addition to technical requirements, states the offence so plainly that it may be easily understood by the defendant and the jury, and if the sense be clear, nice exceptions ought not to be regarded.—2 Hale 193; 5 East, 244; (see new edition 3 East, 139;) Regina v. Ann Jones, 9 Car. & P. 761, (38 E. C. L. R.;) The King v. Wright, 28 E. C. L. R. 123; The King v. Dale, 13 Price, 171; (6 Eng. E. R. 71;) The State v. Wimberly, 3 McCord, 103; Com. v. Wentz, 1 Ashmead, 269, 272; 1 Chitty Cr. Law, 171, top page; Worrell v. The State, 12 Ala. 732; State v. Bullock, 13 ib. 417; McKinny v. People, 2 Gilm. 548.

The omission of "to," as above stated, is a mere clerical error, and will be supplied by intendment.—Simmons v. Com., 1 Rawle, 142; Williams et al. v. Williams, 1 Verm. 271; State v. Brady, 14 ib. 355; State v. Molier, 1 Dev. 266; 2 Hawk. Ch. 25, § 86; 1 Chitty Cr. L. 293, (note,) cites 13 Price 172;

1 Cow. 230; Thacher's Cr. Cases; State v. Whitney, 15 Vermont, 298.

The grammatical necessities of the sentence plainly indicate that the verb "know" is in the infinitive mood, and that "to" is the word omitted. It is, then, a clerical error which will be supplied.

The repetition of the words "her, the said Hannah Smith," after the word "know" would have been needless, and in violation of correct grammar. The entire sentence shows that the word "know" refers to Hannah Smith, and to no one else. If it be doubtful to whom the words "carnally know" refer, that sense will be placed upon those words which will support the indictment, and not that construction which will defeat it. The only meaning of those words to support the indictment will refer them to Hannah Smith.—1 Chitty Cr. Law 231, (*a*) top page: 5 East 244, (new ed. 234;) 2 Hale 184.

If the 30th rule of Syntax, in Bullion's Grammar be correct, then the words "Hannah Smith" should not have been repeated after the word "know." For "her, the said Hannah Smith," is the member in the sentence referring to two different clauses, to wit, "did abuse" and "to know," and as such is equally applicable to both. It should be repeated after "abuse" and understood after "to know."—See Bullion's Eng. Gram. 125.

Our laws, unlike the old English Criminal Code, are framed in a spirit of humanity, and should be so administered as to afford "a shield to protect the innocent, and a sword to punish the guilty."—McKinny v. People, 2 Gilm. *supra*, 551.

2. The Criminal Court of Mobile has the same power that Circuit Courts have.—Acts 1846, 30, § 4. The Circuit Courts have power to hold special terms for the "trial of criminal causes," (Clay's Dig. 293, § 24) and to empannel a grand jury.—(10th chap. Penal Code, § 26.)

But it may be contended that the words "trial of criminal causes" in the 24th section, Clay's Dig. 293, means criminal causes where an indictment had been previously found, and that those words mean the trial of unfinished criminal causes.

A successful answer to this, I conceive, would be, that the power of trial presupposes and necessarily implies the power also of inquiry and accusation.—2 Hawk. Ch. 6, § 2; Dun v. State, 2 Pike 252 and 5; Friar v. State, 3 How. 422.

Admit that the Circuit Courts cannot, at their special terms, originate bills of indictment, it does not follow that the Criminal Court of Mobile is thus limited and restricted. The judicial power of the Circuit Courts over criminal causes is conferred by the constitution.—Art. V, § 1, 6 and 7. If there was no time fixed by statute for holding these courts, it would be discretionary with the judges, and they might hold these courts whenever they saw proper. But the time is regulated by statute (Clay's Dig. 288-9) and these courts can hold no other terms, except under particular circumstances prescribed and limited by law.—Clay's Dig. 293, § 24, 26, 27.

While thus holding special terms, they lose their character or power of courts of general jurisdiction, and become for the time, courts of special and limited jurisdiction, and every fact necessary to confer jurisdiction must affirmatively appear on their records.—Dun v. State, 2 Pike, *supra*.

Such is not the case with the Criminal Court of Mobile. There is no limitation or restriction of their jurisdiction at their terms of special adjournment.—See acts of '46, 29, § 3. It is altogether discretionary with the judge when he holds those other terms, provided they be holden by special adjournment from a regular term. This court has all the power at an adjourned term which it has at a regular term, and while so sitting retains its power as a court of general jurisdiction.—Friar v. State, 3 How. 422. It may be said that the words "despatch of business," limit them to unfinished business.

The word "despatch," when used as a verb, means, among other things, "to finish." But in the third section referred to, it is evidently used as a substantive, or noun, and when so used means "speedy performance, execution, transaction of business," &c.

The word "special" is not used in the third section of the act of 1846, establishing the Criminal Court of Mobile. It is used in the 24th section, Clay's Dig. 293, authorizing Circuit Courts to hold "special sessions."

Adjourned terms are not new terms, but a part of the regular term.—Com. v. Sessions of Norfolk, 5 Mass. 435; Mechanic's Bank v. Withers, 6 Wheaton 106.

The Circuit Courts have the power of jail delivery.—Clay's Dig. 294, § 30. So has the Criminal Court of Mobile. These

commissioners to deliver the jails have the power to originate business as well as to try those cases originated by other justices.—1 Chitty Cr. Law, 145-6; 2 Hawk. Ch. 6, § 2; 2 Hale 34. Under a commission of jail delivery the justices could try no one who was not either in actual or constructive custody.—1 Chitty 145; 2 Hawk. Ch. 6, § 5; 4 Black. 271.

COLEMAN, J.—The prisoner was convicted of the offence in this case at a special term of the City Court of Mobile. The bill of indictment was found by a grand jury organized at said term, and the question arises whether the court had the power to originate a criminal proceeding at said special term?

After a careful examination of all the statutes on the subject, we are satisfied that the court rightfully exercised jurisdiction in the matter.

By the third section of the act to establish a Criminal Court in the city of Mobile, it is enacted "that said court shall hold three terms in each year, commencing on the first Mondays in November, February and June, and may, by special adjournment, hold such other terms as may be necessary for despatch of business."

The fourth section of the act declares "that said court shall have concurrent jurisdiction with the Circuit Courts in the administration of the criminal law in said county."

By the act of 1807 it was enacted, that a special session of any Circuit Court may be held by order of the judge or judges of the same, whenever it may be necessary for the trial of criminal causes; and the act of 1819 declares that said judges shall have the power, on the application of any person charged with a criminal offence, to hold a special session for the trial of such person.

The twenty-sixth section of the tenth chapter of the Penal Code provides for the empannelling of a grand jury at any extra or special term of the Circuit Court.

From these statutes we think the jurisdiction of the court in the case is clearly deducible.

The objection that the record does not show affirmatively that the grand jury was drawn, summoned and empanneled according to the act, cannot be supported. It has been uniformly held by this court that if such objections could have availed the defen-

dant, they should have been pleaded in abatement.—The State v. Greenwood, 5 Por. 474; The State v. Pile & Pile, 5 Ala. 72; Shaw v. The State, 18 ib. 547.

The defendant moved the court below in arrest of judgment, on the ground of the insufficiency of the indictment. The part of the indictment objected to reads thus: "That John Nugent, late of said county, in and upon one Hannah Smith, (she, the said Hannah Smith, then and there being a female child under the age of ten years,) feloniously did make an assault, and her, the said Hannah Smith, then and there feloniously did abuse in the attempt *carnally know*."

The indictment is founded on the seventeenth section, third chapter of the Penal Code, which is in these words: "Every person who shall carnally know, or abuse in the attempt to carnally know, any female child under the age of ten years, shall, on conviction, be punished by imprisonment in the Penitentiary for life." We think the indictment fails to give a full and sufficient description of the offence in omitting to specify the individual whom the defendant attempted to carnally know. The attempt carnally to know the infant constitutes the enormity of the offence, and the indictment ought certainly to state with legal precision and certainty, upon whom the attempt was made. The rule laid down in the standard works on criminal pleading as to the statements in an indictment, is, that all the ingredients of the offence with which the defendant is charged, the facts, circumstances and intent concerning it, must be set forth with certainty and precision.—Arch. Cr. Pl. 28; Chitty's Cr. Pl. 169. The rule is also without exception, that an indictment must be certain as to the person against whom the offence was committed. In indictments for offences against the persons or property of individuals, the christian name and surname of the party must be stated, if known, and if unknown, as in the case of the murder of a stranger, he must be described as a person unknown.—2 Hawk C. 25, § 71-2; 2 Hale 181; Arch. Cr. Pl. 45. The omission to state the name, or stating the wrong name, is fatal to the indictment. The Attorney General, however, does not controvert the law referred to, but contends that by a proper construction of the indictment, the words "carnally know" must refer to Hannah Smith. We are unable to reach that conclusion. Even if we supply the word *to* before the words "carnal-

ly know," in the indictment, by no rule of grammatical construction or legal intendment, can we say they refer to Hannah Smith.

The judgment below is reversed, and the cause remanded, that a good indictment may be found.

DARGAN, C. J.—My own impressions, uninfluenced by the opinion of my brothers, would have led to an affirmance of the judgment, but as I cannot say that my mind is free from all doubt as to the sufficiency of the indictment, I yield to their opinion, and join in reversing the judgment.

FLANAGAN *vs.* THE STATE.

1. An indictment for an assault with intent to murder contained two counts. The judgment entry recites that "the State moved that the defendant be tried on the first count in the indictment, and that the second count be postponed until the first is disposed of, to which there was no dissent by the defendant." On the trial upon the first count, the jury found the defendant "guilty as charged in the bill of indictment," and the solicitor afterwards entered a *nolle prosequi* to the second count. *It was held*, 1. That the postponing of the second count until the first was disposed of, was an error for which the judgment of conviction must be reversed.
2. That the defendant is not precluded from taking advantage of the error, by the recital in the judgment entry that he *did not dissent* from such a course of proceeding.
3. That if the defendant had *consented* to go to trial on one count only, yet the verdict, being general, would be erroneous.
4. That the appellate court will not say, that the defendant was not injured by the error, because a *nolle prosequi* was afterwards entered to the second count.

ERROR to the Circuit Court of Wilcox. Tried before the Hon. E. Pickens.

BAGBY and STONE, for plaintiff in error:

1. The ancient rule was, that in felonies, particularly of the higher grades, the prisoner was not permitted to make consents

which operated to his prejudice. The modern rule has relaxed the principle, only so far as to allow him by express consent to waive any of his rights.

2. In this case the defendant was indicted for two distinct felonies in one indictment. It is not material that the several counts charge him with an offence of the same grade against the same person. The law must regard them as distinct offences. The indictment is carved into two cases, and one of them postponed, upon which he is subject to be twice tried, and that without his consent. Upon this indictment, thus divided, he could be twice jeoparded, and might be twice convicted. It does not cure the error that a *nolle prosequi* was afterwards entered as to the remaining count. The decision must have been correct at the time, and cannot be remedied by the action of the solicitor after the conviction. The law is very jealous of the life and liberty of the citizen.—Slack v. State, 6 Ala. 676, on p. 678-9, particularly the latter clause; The People v. McKay, 18 Johns. 212, on p. 218.; see also, Kreps v. State, 8 Ala. 951, on p. 956.

3. We are able to find no adjudged State cases in point. This is a strong argument in our favor; for if the principle existed, it would somewhere be expressed.

4. Even in civil suits, the law will not tolerate the splitting up of cases, and the rendering of more than one judgment in the same cause. The unity of proceedings in law courts is always preserved.—Givens v. Robbins, 5 Ala. 676; Edwards v. Lewis, 18 ib. 494.

Attorney General, for the State:

I. The first assignment of error is, that the Circuit Court erred in permitting the trial to proceed on one count, and postponing the second.

1. The attorney for the State has the power to elect upon which count in an indictment he will proceed, and abandon the others. This power arises from the very nature of his office.—Commonwealth v. Tuck, 20 Pick. 366; 1 Chitty's C. L. 249.

2. Although the State's counsel proposed simply to postpone the second count, yet the legal effect and operation of that course was an election on his part to proceed on the first count, and abandon the second.—Burk v. State, 2 Har. & J. 426-32.

3. The offence is the same in both counts. Suppose the de-

fendants below, Flanagan and Wright, should hereafter be tried on the second count, which was postponed, could one plead successfully a former conviction for the same offence, and the other a former acquittal? The constitution says, that "no person shall, for the same offence, be twice put in jeopardy of life or limb." The court is bound judicially to know that the defendant in this court, Flanagan, is charged with the commission of the same offence in both counts—the one upon which he was tried, and in the one postponed. There would be no doubt then but that the plea of former conviction would be sustained as to Flanagan, upon a trial hereafter upon the second count. As to Wright, the party acquitted on the trial below, he is charged differently in the two counts. In the first, as principal in the second degree, and in the second as accessory before the fact. He was acquitted on the count charging him as principal; and the rule is, that an acquittal as principal will bar an indictment as accessory before the fact, for the same offence.—4 Black. Com. 28, top p.; 12 Ala. 462; U. States v. Keen, 1 McL., 445.

4. Neither of the defendants below was injured by a trial on the first count, and postponing the other. If the second count had been for an offence of milder punishment, the case might have been different; but the punishment is the same in both counts. Accessories are punished as principals.—Clay's Dig. 416, § 30; 1 Russ. on Cr. 32; 4 Black. Com. 39; 12 Ala. 462; U. States v. Keen, 1 McL. 447.

5. If any error has intervened in postponing the second count, it cannot be heard until they are tried on that count.—State v. Willingham, 4 Ala. 539.

II. The second assignment of error is, that the verdict was general, when it should have been restricted to the first count.

The second count was by legal operation abandoned, and stood as if the jury had found the indictment a true bill, as to the first count only. The first count was the whole indictment.—*Supra*, Har. & J. 432.

III. The third assignment is, that a *nolle prosequi* was not entered until after verdict.

I have attempted to show that the second count was virtually abandoned before the jury were sworn and empannelled; but if abandoned after verdict, it is good.—Young v. The King, 3 Term R. 107; Commonwealth v. Tuck, 20 Pick. 367.

CHILTON, J.—The record of the conviction of the plaintiff in error is in a very confused state. No plea or issue appears in it, nor does it appear that he was ever arraigned. The only evidence afforded as to the issue tried by the jury, is found in the judgment entry, which recites that "the defendants came in their proper person, also their attorneys; and the defendant, O. H. P. Wright, demurred to the first count in the bill of indictment, which having been argued by counsel, is overruled by the court. The State then moved that the *defendant* be tried on the first count in the indictment, and that the second count be postponed until the first is disposed of, to which there was no dissent by the defendants; and thereupon the State announced itself ready for trial on the first count of the bill of indictment, and the defendants did the like, whereupon came a jury, to-wit, &c., who having been duly elected, tried and sworn well and truly to try the issue joined, upon their oaths say, that they find the defendant, Francis L. Flanagan, guilty as charged in the bill of indictment, and that they find the other defendant, O. H. P. Wright, not guilty." The court upon this finding proceeded to sentence Flanagan to five years imprisonment in the penitentiary, and the record then states, that "the solicitor, by leave of the court, enters a *nolle prosequi* as to the remaining count;" and thereupon the defendant, Wright, was discharged.

Although there is much plausibility in the position assumed by the Attorney General, that the postponing of the second count until the first was disposed of, amounted to an abandonment by the solicitor of the second count, we do not think the record will bear him out in that construction. That distinctly informs us that the second count was merely *postponed* (delayed or deferred) to a future period, and that period is designated; namely, until after the first count is disposed of. How then can we say it was abandoned? The fact, moreover, that the solicitor afterwards entered a *nolle prosequi* as to the second count, shows that he did not abandon it.

It is not contended by the learned counsel for the State, that an indictment containing several counts can thus be split up, and that the defendant may be tried upon the second count after a trial and conviction, or acquittal upon the first. This would manifestly be putting the prisoner twice in jeopardy for the same offence, and would amount to a palpable violation of his

constitutional rights. This was clearly an error. But, it is said, that to this "there was *no dissent* by the defendants." Whether, if they had given their assent directly and positively to this mode of trial, the prisoner would have been concluded by it, and estopped from pleading the former conviction in bar of a subsequent prosecution, it is not material now to inquire. The language here employed does not justify the court in concluding that any such assent was given as should conclude the defendant. However true it may be, as a rule governing syntactical construction, that the use of two negatives constitutes an affirmative, it would be very unsafe in legal proceedings, involving the lives or liberties of the citizens, to rely upon such grammatical refinements in arriving at the true meaning of sentences. The most that may be safely predicated of the negatives here used is, that the defendant said nothing when the court, upon the motion of the solicitor, ordered that he should be tried upon the first count, postponing the second until that was disposed of. Let us, however, concede that the prisoner did consent to go to trial upon one count only, the other being held over him for future action. This would not relieve the case from error, since the jury find him guilty generally upon the whole indictment; whereas it is clear that if he pleaded to either count, he was not called upon to respond to the second, and did not plead to that. So that, as the record now presents the case, the prisoner was convicted upon a count upon which he was not arraigned, and to which he never pleaded.

But, it is argued, he has not sustained any injury from the error complained of, since the two counts embrace substantially the same charge; and a *nolle prosequi* having been entered as to the second count, he is in no danger of again being tried upon that. In response to this, we have only to say, that in cases of this magnitude, which are made felonies by the statute, involving, as we have said, the liberty of the citizen, the court will not be astute in speculating upon the chances of injury to the accused, in order to sustain a conviction effected under such circumstances, under a practice not warranted, as far as our researches extend, by any precedent, and certainly opposed in its tendency to the fundamental law of the land. It is impossible for us to say what effect these irregularities may have had upon the finding of the jury, or that their verdict was wholly unin-

fluenced by them. Neither can we say that the defence may not have been influenced prejudicially to the prisoner, by trying him upon one count, while the other was held over him for future action.

The court is unanimous in the opinion, that the sentence of conviction must be reversed, and the cause remanded, that the prisoner may be again tried upon the first count in the indictment. The usual order will be made for remanding the prisoner to the appropriate county for trial.

Judgment accordingly.

FLAKE *vs.* THE STATE.

1. An indictment for playing cards "at a public place" is good.
2. An infirmary is a public place within the statute against gaming.

ERROR to the Circuit Court of Barbour. Tried before the Hon. John D. Phelan.

THE indictment in this case was for playing cards "at a public place." The proof showed that the playing took place in a lower room of a certain building in Eufaula, which room with an adjoining one was used as an infirmary by defendant, who was a physician. It was also proved that the defendant had advertised that he had established an infirmary, into which he would receive and treat diseased negroes, but the particular building in which the patients would be placed was not advertised. The court charged that the place above described was a public place.

P. T. SAYRE, for plaintiff in error.

THE ATTORNEY GENERAL, for the State.

DARGAN, C. J.—The indictment in this case is good according to the case of Roquemore v. State; and we think, that the place at which the playing took place is a public place within the meaning of the act.

CLARK *vs.* THE STATE.

1. In an indictment for permitting a gaming table to be exhibited and carried on in a house occupied by the defendant, it is not necessary to aver that the defendant does not come within the proviso of the statute.—Clay's Dig. 434, § 16.
2. When a new offence is created by statute, an indictment which describes the offence in the language of the statute is sufficient.
3. An indictment under the statute against permitting gaming tables to be exhibited, need not allege the name of the person by whom the table was exhibited, nor that his name is unknown.

Error to the Circuit Court of Montgomery. Tried before the Hon. John D. Phelan.

Watts, Judge & Jackson, for plaintiff in error:

1. The indictment in this case is framed under the 16th section of the 6th chapter of the Penal Code, (Clay's Dig. 434) and is defective and insufficient in not setting forth the facts and circumstances constituting the offence.

2. In framing an indictment under a statute it is not always sufficient to pursue the very words of the statute, unless, by so doing, the fact in the doing or not doing of which the offence consists, be fully, directly and expressly alleged, without uncertainty or ambiguity.—Turnipseed v. State, 6 Ala. 664; State v. Brown, 4 Por. 410; Williams v. State, 15 Ala. 259; Beasly v. State, decided at the last term, and Nugent v. State, decided at the present term.

3. In prosecutions against persons for gaming, or for keeping or exhibiting gaming tables, we have remedial statutes, stating what shall be sufficient for the indictments to charge.—Clay's Dig. 433, § 11, 15. But there is no remedial statute applicable to prosecutions for knowingly permitting gaming tables or banks to be exhibited and carried on in one's house or premises. Consequently an indictment for such offence should be framed according to the rules of criminal pleading at the common law.

4. The indictment in this case is fatally defective in not charging that the faro bank was kept or exhibited by some person or persons, and the name or names of the person or persons, if known, should have been stated, and if unknown it should have

been so stated.—Ball v. State, 7 Black. 242; Butler v. State, 5 Blackf. 280; State v. Irvin, ib. 343, and State v. Davis, 7 Ohio 204, which is precisely in point.

5. Every fact stated in the indictment may be true, and yet the defendant be legally not guilty. For aught this court can know, a faro bank may be exhibited or carried on in a different mode and sense from that prohibited by the statute. It is not charged to have been exhibited and carried on for gaming, and that is what was intended to be prohibited by the statute. And no person being charged to have exhibited and carried it on, it may have been done by a slave, and if so, no indictment for it would lie.—Clay's Dig. 445, § 42.

6. The indictment is bad for another reason. It does not negative the proviso contained in the section creating the offence.—Clay's Dig. 434, § 16. True, the proviso is not in the same clause which creates the offence, but it is in the same section, and is incorporated in the enacting clause "by words of reference."—Arch. Cr. Pl. 49, 52.

Attorney General, for the State:

1. The demurrer to the first count in the indictment was properly overruled. The offence is set out in the words of the statute, (Clay's Dig. 433-4, § 12 and 16) and the indictment contains every averment necessary to be made.—Com. v. Maddox, 2 Vir. Cas. 19; Com. v. Lampton, 4 Bibb 262; Com. v. Crupper, 3 Dana, 466; Com. v. English, Lit. Sel. Cas. 417; Montee v. Com. 3 J. J. Marsh. 133; State v. Dale, 3 Blackf. 294; State v. Bougher, ib. 307; State v. Weaks, 7 Humph. 522; Covy v. State, 4 Por. 186; State v. Mitchell, 6 Mo. 147; State v. Whitworth, 8 Por. 440; 1 Russ. on Crimes, 299-300, in note.

2. The proviso in the 16th section, (Clay's Dig. 434) is not descriptive of the offence, and is matter of defence, and need not be negatived in the indictment.—See the correct rule laid down in Arch. 52; 2 Hawk. Ch. 25, § 113; 1 Chitty Cr. Law, 284; 2 Strange 1101; 1 Lord Raymond, 120; 1 East 647, note; 1 Chitty Pl. 229; 2 Pick. R. 141; 2 Nott & McCord, 365; 18 Verm. 197; 17 ib. 149; 1 John. 513; 3 ib. 438; 4 ib. 304.

COLEMAN, J.—The indictment in this case charges that "the defendant, being the occupant of a certain house at the

race track, near the city of Montgomery, in said county, did then and there unlawfully and knowingly permit and suffer a certain gaming table, called a faro bank, to be exhibited and carried on in said house, by him the said John Clarke, so occupied as aforesaid."

The indictment is founded on the 16th section, chap. 6th, of the Penal Code, in these words: "If any owner or occupant of any house, out house, or other building, booth or tent, shall knowingly permit, or suffer any of the tables, or banks, particularly or generally described as aforesaid, to be carried on or exhibited in his house, out house, or building, booth or tent, and be thereof convicted, he shall be fined in a sum not exceeding two thousand dollars: *Provided*, always, that if any owner or occupant of any house, out house, or other building, booth or tent, shall give information to any judge or justice of the peace of the proper county, against any person keeping, exhibiting, or concerned or interested in said table or bank, within six days after the same comes to his knowledge, he or they, so informing, shall not be liable to the penalties of this section.

That part of the act above referred to, which describes the banks or tables, is in these words: "If any person shall hereafter be guilty of keeping or exhibiting any gaming table, called A B C, or E O, or Roulette, or Rowley Powley, or Rouge et Noir, or Thimbles, sometimes called Three Ticket Lottery, or Chuckerluck, or Faro Bank," &c.

1. It is contended that the indictment is defective because it does not negative the proviso contained in the statute creating the offence. The rule on this subject is, that if there be any exception contained in the same clause of the act which creates the offence, the indictment must show negatively that the defendant does not come within the exception.—Arch. 52. But where the act contains provisoes and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exception, or to negative the proviso it contains.—1 Chitty's Cr. L. 283. Nor is it even necessary to allege that the defendant is not within the benefit of its provisoes, though the purview should expressly notice them, as by saying that none shall do the act prohibited, except in the cases hereinafter excepted; (Hawk. b. 2, c. 25, § 113,) for all these are matters of defence, which the prosecutor need not anticipate, but

which the prisoner must prove.—2 Burr. 1037; 5 T. R. 83. In an indictment against the receiver of stolen goods on the statute of Ann, whereby he is made liable, if the principal is not taken, it is not necessary to aver that the principal is not taken; or on the statute 22 George III, to state that the principal has not been convicted.—2 Lord Raymond, 1378; 5 T. R. 83; 2 Leach 578. We think it clear in this case, that the proviso is not in the same clause which enacts the offence, and under the authorities cited the matter of defence in the proviso was such as the prisoner must prove.

2. It is contended that the indictment is defective in not setting forth the facts and circumstances constituting the offence, and particularly in not stating that the faro bank was kept or exhibited by some person, and that the name of the person should have been stated if known, and if unknown it should have been so stated.

It has been repeatedly held by this court, that where a statute creates a new offence, all the law requires is a description of the offence in the indictment in the terms of the statute enacting it. —State v. Duncan, 9 Por. 260; State v. Briley, 8 ib. 474; State v. Click, 2 Ala. 26. As an exception to this general rule it was held that it is not always sufficient to pursue the very words of the statute, unless by so doing you fully, directly and expressly allege the facts, in the doing or not doing of which the offence consists.—State v. Brown, 4 Por. 413. There seems to be some conflict in the decisions on the question whether the indictment should state the name of the person exhibiting the gaming table, &c. In Ball v. State, (7 Blackf. 242,) it was held that an indictment against a person for suffering gaming in his grocery, should give the names of the persons who played, or state their names to be unknown. The court, in giving this opinion, refer to two decisions to support it, Butler v. State, 5 Blackf. 280, and the State v. Irvin, ib. 343. We find, on examining these cases, that they were on indictments for gaming, and not for permitting gaming to be carried on in a house, &c. In the case of State v. Dale, (3 Blackf. 294,) it was held that in an indictment for permitting gaming in a licensed grocery, it is not necessary to set forth the game that was played. In the Commonwealth v. Lampton, (4 Bibb 261) it was held that on an indictment for suffering gaming in defendant's house, it was not

necessary to set forth the names of those engaged in the gaming. The same principle was established in English v. Commonwealth, (Lit. Sel. Cases, 417.) In Commonwealth v. Crupper, (3 Dana, 466,) it was decided on a charge for keeping a gambling house, that the indictment will be good without specifying the sum that was lost and won, and by whom it was lost and won. The same rule was fully affirmed in Montee v. Commonwealth, (3 J. J. Marshall, 133.) In England, in an indictment for keeping a common gaming house, it has never been held necessary to state the names of the persons gaming.—Arch. 753, and the numerous cases there cited. In Rex v. Taylor, 3 B. & C. 502, Holroyd, J., said that it would be sufficient merely to have alleged that the defendant kept a common gaming house.

In this case, the charge in the indictment that defendant suffered a gaming table, called a faro bank, to be carried on and exhibited, &c., necessarily, and according to the plain meaning of the words, implied that it was exhibited by some person for gaming. The specific table, to wit, a faro bank, is stated in the indictment, and if a further description were required, it might be well asked, where ought the description to stop. Must a particular description of the table, and that money was won and lost thereon on the turning of cards, be given to show that it was a faro bank?

We have already seen that, according to the great weight of authorities, it was unnecessary to state the name of the person exhibiting the gaming table.

Let the judgment be affirmed.

MORGAN *vs.* THE STATE.

1. When it is alleged in the commencement of an indictment that "the grand jurors for the State of Alabama upon their oaths present," &c. and the name of the proper county is stated in the caption, the proceedings are sufficiently certain, although it is not averred in the indictment that such grand jurors were selected, empannelled, sworn and charged to inquire for the body of the county.

2. An objection to the formation of the grand jury cannot be raised for the first time in the appellate court.
3. The addition of the county of the defendant's residence is mere matter of form, and the failure to aver it does not affect the validity of an indictment.

ERROR to the City Court of Mobile. Tried before the Hon. Alex. McKinstry.

JEWETT, for plaintiff in error:

A grand jury of good and lawful men of the county for which the court is held, shall be returned agreeably to law, at each term, who shall inquire and true presentments make of all crimes, &c., committed in their county, and such offences the court has jurisdiction to try.—Clay's Dig. 294, § 32.

An indictment, in its caption, must state the jurors by whom it was found.—Wheat. Crim. L. 63; McClure v. State, 1 Yerg. 260; 1 Ch. Crim. L. 333; 5 How. Miss. 32; Peck's R. 140-66.

If the caption omit to state that the jurors are of the county aforesaid, the indictment will be vicious.—Wheat. Crim. L. 65; Tipler v. State, Peck's R. 8; Cornell v. State, Martin & Yerg. 147; Bacon's Ab. 93; Woodside v. State, 2 How. Miss. 655; 1 Chitty's Crim. L. 333.

In an indictment nothing can be taken by intendment.—3 Stew. 130; State v. Coleman, 3 Ala. 15.

In an indictment there must be, to the name of the defendant, an addition of his residence. The county must be distinctly laid.—1 Ch. Crim. L. 208-9-10; 2 ib. 1-2-3; 3 ib. 750; Arch. Crim. Pl. 36.

Where a positive fact is averred, it should be stated to be done then and there, after the county, &c., have been clearly expressed in the body of the indictment.—Ch. Gen. Law, 198; Com. Dig., Indict., G. 1; 1 Sess. Cas. 178.

The words, then and there, referring to the county in the margin, is not a sufficient laying of the venue.—Kennedy v. Commonwealth, 3 Bibb. 490; 2 Hawk. 348; Addison, 71; 3 Modern, 265.

Time and place must be attached to every material fact averred in an indictment.—Arch. Crim. Pl. 46, and references therein.

ATTORNEY GENERAL, for the State:

The principal objection to this indictment is, that the body of the indictment does not show that the grand jury who found the bill were chosen, sworn, &c. for the county of Mobile.

1. It is the office of the caption to show in what county the indictment was found and returned by the grand jury, and this need not be repeated in the body of the indictment.—Dean v. State, Martin & Yerg. 127; see Meig's Dig., Indictment.

The fact that the indictment does not show that the grand jury were empannelled and sworn to inquire of crimes and offences committed within the body of the county, is not error.—Hurley v. State, 6 Ohio, 405.

In this respect the indictment is in strict conformity to the English common law precedents.—See forms in 2 Chitty Cri. L. 1-2, &c., and also see State v. Nixon, 18 Ver. 70; State v. Harden, 1 Brev. 47; State v. Sanderlin, 6 Ham. 285; State v. Long, 1 ib. 386.

Where it appears from any part of the record, that the grand jury were sworn, &c., returned the bill, &c., the indictment is regularly in court.—State v. Lassly, 7 Por. 527.

The grand jury are sworn, &c. for a particularly county, and if the caption or historical part of the indictment shows this, the body of the indictment need not.—Clay's Dig. 294, § 32.

2. No objection can, for the first time in this court, be taken to the manner in which the grand jury were empannelled, drawn, &c. Pleading to the indictment admits its genuineness.—State v. Shaw, 18 Ala. (Jan. Term, 1851;) State v. Clarkson, 3 ib. 378.

3. It is said that the words, then and there, are more certain than a repetition of the time and place.—1 Chitty Cri. L. 221; Arch. Cr. Pl. 39. "Then and there" refers to the venue in the margin.—State v. Harden, 1 Brev. 47.

4. The words, "within said county," are equivalent to late of said county.

CHILTON, J.—The first and principal objection to this indictment is, that in its commencement it states that "the grand jurors for the State of Alabama upon their oath present," &c., instead of the averment that such grand jurors were elected, empannelled, sworn and charged to inquire for the body of Mobile county. The indictment conforms to the English common law precedents, which usually commenced, "the jurors for our Lord the King, upon their oath present," &c.—2 Chitty's Crim. L. 1-2. In England, however, as in this country, the caption shows the court in which the proceedings were had, as well as

the jurors by whom the indictment was found, and this, although no part of the indictment, makes the proceedings sufficiently certain.—See 1 Chitty's Crim. L. 326-7-8, and cases cited. Objection is taken to the caption in this case, that it is but the certificate of the clerk, and not a transcript from the record of the City Court; but the objection is not sustained by the record, a portion of which record the clerk duly certifies it is. We cannot indulge a presumption against the verity of his certificate, as to what constitutes the record, and consequently must treat the caption as properly constituting a portion of it.

In the State v. Lassley, 7 Port. 526, it was held, that where it appears from an entry on the record, that the grand jury elected, empannelled, sworn and charged, returned a bill of indictment into court, it must be intended to have been done as the law requires, the reverse not being shown by plea, &c. In the case before us, the defendant below treated the indictment as having been properly found and returned, by his plea of not guilty. If he desired to take advantage of any irregularity in the formation of the grand jury, he should have done so by an appropriate plea. It is well settled, that he cannot raise the objection for the first time in this court.—State v. Clarkson, 3 Ala. 378; State v. Shaw, 18 ib. 547, and cases there cited.

The objection that the addition of the county of the defendant's residence is omitted, cannot be supported. It is usual and proper to charge that, "A. B., late of said county," &c., which refers to the county stated in the margin, as do also the words, "then and there," as used in the body of this indictment; (Cro. Jac. 167; 1 Brev. 47,) but it is sufficient to state, as is here done, that the prisoner committed the felony "within said county." The addition of residence in England was considered unnecessary, except in cases where process of outlawry could issue, and the necessity for it in any case was rested upon their statute of 1 H. 5, c. 5; see Leeche's Case, Cro. Jac. 167. With us, it is but mere matter of *form*, and the failure to aver it does not affect the validity of the indictment. As to the sufficiency of the indictment, see 4 Dev. 336, and 1 Chitty's Crim. L. 208.

We are unable to percieve any defect in this indictment, available to the defendant, and the judgment of conviction must be affirmed.

LINDSAY *vs.* THE STATE.

1. An indictment for selling spirituous liquors to a slave, which alleges that the defendant sold "to one Henry, a slave, the property of one M. H., a certain commodity, to-wit, one gallon of whiskey, without the consent of the master, owner or overseer of said slave, either verbally or in writing, expressing the article permitted to be sold, being first had and obtained," is good under the Act of 1850, (Pamphlet Acts, 1849-50, p. 49.)
2. An indictment for selling *whiskey* to a slave cannot be supported by proof of the sale of any other kind of liquor, although the liquor specified is laid under a *videlicet*.

ERROR to the Circuit Court of Montgomery. Tried before the Hon. John D. Phelan.

WATTS, JUDGE & JACKSON, for plaintiff in error.

ATTORNEY GENERAL, for the State.

COLEMAN, J.—The charge in the indictment in this case is, that the defendant sold "to one Henry, a slave, the property of one Maria Herron, a certain commodity, to-wit, one gallon of whiskey, without the consent of the master, owner or overseer of said slave, either verbally or in writing, expressing the article permitted to be sold, being first had and obtained."

The defendant contends that the indictment is not good, because it was framed under the act of 1841, which was repealed by the act, "the more effectually to suppress the evil practice of trading with slaves," passed in 1850. We think that the first act was repealed in part by the latter, but we consider the indictment good under the latter act. The exception in the indictment in favor of the defendant, is much broader than he was entitled to under the last act, and giving him all, and even more latitude than he was entitled to, he certainly ought not to complain.

On the trial, it was proven that the defendant sold and delivered to the slave named in the indictment, several drinks of either ale or whiskey, but of which, the witness could not state.

The court refused the defendant's request to charge the jury

that if they were not satisfied from the evidence, beyond a reasonable doubt, that the article sold was whiskey, they must find for the defendant, and charged the jury that the commodity averred to have been sold to the slave being laid under a *scilicet*, it was not necessary to prove the particular commodity named, but proof of the sale of any other commodity of a like kind, by the defendant to said slave, would be sufficient to sustain the indictment. The indictment in this case very properly specified the particular commodity alleged to be sold to the slave. It was necessary to enable the defendant to prepare for his defence, and to enable him to plead a conviction or acquittal upon this indictment in bar of another prosecution for the same offence. But it was also necessary that the fact be proved as alleged. Any material variance between the fact laid and the fact proved, the *allegata* and *probata*, will be fatal. As, for instance, (the well known case,) an indictment for stealing a pair of shoes cannot be supported by evidence of a larceny of a pair of boots.

It is well settled that even an unnecessary allegation, but which is descriptive of the identity of that which is legally essential to the charge, must be proven as laid. Thus, an indictment for stealing a black horse will not be supported by proving the stealing of a horse of some other color. The allegation in this case, that the defendant sold whiskey, was not supported by the proof that he sold ale. The court erred in ruling to the contrary, and the judgment is therefore reversed and remanded.

Ex parte CROOM & MAY.

1. A prisoner charged with a capital offence, after having been refused bail by a Circuit Judge, on application by *habeas corpus*, may petition the Supreme Court for a revision of the decision of the Circuit Judge.
2. The proper practice in such case is, for the prisoner to petition the Supreme Court for the writ of *habeas corpus* and such other remedial process as may be necessary to render its control effectual, setting forth under oath such a state of case as will show that the Circuit Judge erred to his prejudice, and that he was entitled by the case then made to the relief which he seeks.

3. If the Supreme Court deems the showing *prima facie* sufficient to entitle the prisoner to bail, the writs of *habeas corpus* and *certiorari* will be awarded, to bring before the Supreme Court the body of the prisoner and the proceedings had before the Circuit Judge, that if, upon a full hearing on the return of the writs, the prisoner should be adjudged entitled to bail, he may be allowed to give bail in such sum as may be prescribed.
4. Instead of the writs of *certiorari* and *habeas corpus* issuing from the Supreme Court, an agreed statement of the facts and proceedings had before the Circuit Judge may be submitted by the counsel for and against the prisoner, and if the Supreme Court decides that the prisoner is entitled to bail, application may again be made to the Circuit Judge.
5. The fortieth section of the eighth chapter of the Penal Code, [Clay's Digest, 444,] by which it is enacted that if the defendant in capital cases is not tried at the first term at which he is properly triable, on account of any of the causes therein specified, he shall not be entitled to bail as a matter of right, *but that he may claim to be discharged on bail if he is not tried at the second term*, unless the failure is occasioned by his own fault or misfortune, or on his application, or with his assent, is not repugnant to the seventeenth section of the first article of the constitution, by which it is declared, that "all persons, before conviction, shall be bailable by sufficient securities, *except for capital offences where the proof is evident, and the presumption great.*"
6. The word "term," as used in the fortieth section of the eighth chapter of the Penal Code, [Clay's Dig. 444,] means *the period of time prescribed by law during which the Court is required to be held*, unless the business is sooner disposed of, *and not the time during which the court may actually be in session.*
7. A prisoner charged with a capital offence, who makes application to be discharged on bail, on account of an unauthorized premature adjournment of the court at the first term at which he was properly triable, without any disposition having been made of his case, makes out a *prima facie* case for relief, by showing that he was arrested and in the custody of the sheriff before the adjournment of court, that the judge adjourned the court, *sine die*, before the expiration of the period allowed by law for holding it, and while there was business on the docket undisposed of, that no disposition was made of his own case, that no cause for the adjournment was assigned in the order, and that none appears in the record. When no cause for the premature adjournment is assigned on the record, the appellate court will not presume that a sufficient cause existed, nor will it require the prisoner to prove that a sufficient cause did not exist.
8. A prisoner in such case may insist on his right to be discharged on

bail on account of such premature unauthorized adjournment, although at the time of adjournment he was confined in the custody of the sheriff, at a place several miles distant from the court-house, and the sheriff was advised by physicians that it was unsafe to remove him on account of his wounds, and although he made no application for a trial, and might have continued his trial on account of his situation.

9. A general order of continuance of all causes not otherwise disposed of, if made at the suggestion, or with the consent of the parties, or their counsel, would operate as a continuance entered in each case by consent, and would be a completion of the business of the court justifying its adjournment.

MOTION for writ of *habeas corpus*, and such other remedial process as might secure the discharge of the petitioners on bail; the Hon. W. R. Smith having refused them bail.

CLARKE & MURPHY, for petitioners.

SMITH & GARROTT, *contra :*

1. The papers accompanying the petition do not present the case in such form that this court can revise the decision of the court below. The certificate of the judge does not describe the transcript with sufficient particularity to identify it.—Minor's Ala. 413; 12 Ala. 58. There is nothing to connect the certificate of the judge with the petition. Neither one contains any reference to the other. There is then no record before the court upon which they can review the decision of the circuit judge.

Again: the circuit judge cannot refer any question to this court, as novel and difficult, until final judgment has been rendered thereon.—Clay's Dig. 294 § 32; ib. 469 § 1; Minor's Ala. 266; 6 Ala. 58. The certificate of the judge cannot be treated as a bill of exceptions. No exception appears to have been taken to the ruling of the judge, and no error can be assigned thereon.—3 Stew. 343; 11 Ala. 732; 18 ib. 519.

2. If the case is not presented in proper form for revision, can this court take original jurisdiction of it? This question was directly made, and decided adversely to the petitioners, in *ex parte* Simonton, 9 Por. 383; see also Mansony, *ex parte*, 1 Ala. 98.

3. But if it is decided that the case, as presented, may be reviewed by this court, then we contend that the several acts of

1807, 1827, and 1841, which are relied on by the petitioners, are unconstitutional. The manifest construction of the seventeenth section of the first article of the constitution is, that bail is not allowable to prisoners in capital cases, if the proof is evident, or the presumption great. It is contended for the prisoners, that, as by the common law all persons, before conviction, were bailable in the discretion of the court to whom application was made, it was intended by this clause of the constitution to secure the right to bail absolutely in all cases except those accused of capital offences, and to leave it, as at common law, discretionary with the court in capital cases. If that was the intention, it was not necessary to say any thing on the subject, and the cases would then have stood as at common law.

But if we admit that this clause leaves it discretionary with the judge to grant or refuse bail, still it must be seen that this discretion is limited to the determination of the question as to the guilt or innocence of the prisoner. The language is plain, "all persons shall be bailable," &c., "except for capital offences where the proof is evident, or the presumption great." The Legislature cannot enlarge, add to, restrict or subtract from any constitutional provision. These acts, then, are unconstitutional, for they make the prisoner's right to bail depend on the length of time he has been in jail, and not on the question of his guilt or innocence.

Again: at common law prisoners were bailable at the discretion of the judge before whom they were arraigned. If these cases are left by the constitution as at common law, then these acts are unconstitutional because they attempt to limit that discretion. The Legislature has nothing to do with the "proof;" that belongs to the courts.

4. But if the acts are constitutional, they must be construed together, and the prisoners have not placed themselves in such a condition as to give them the benefit of the statutes. The language of the acts of 1807 and 1827, is, "if any person shall be committed," &c., that is, imprisoned, not arrested simply. The prisoners in this case were not committed until the 20th April, two days after the adjournment of the court. The acts further provide, that "if any person shall be committed," &c., "and shall not be indicted and tried at or before the next stated term," &c. He must first be committed, and then, "if not tried at the

next stated term," may be entitled to bail under the provisions of the act. The next term cannot mean the term at which he is committed.

5. Again, we contend that under the act of 1841, a prisoner's case does not become "triable," until he appears in court, is arraigned for trial, and pleads to the indictment. It may be that he will plead guilty, and then there would be no *trial* at all. He cannot be tried without being personally present in court, although he may be in the custody of an officer.

6. These statutes were intended for the benefit of the prisoners. They must make application for the benefit of them. The courts cannot, and will not force them. They must themselves be the actors.—Stat. 31, Car. 2; Toulmin's Dig. 662, § 5; see also Simonton, *ex parte*, 9 Por. 390. The prisoners in this case made no motion in the Circuit Court, and they cannot now avail themselves of the benefit of the act of 1841.

7. But the prisoners contend that there was a premature unauthorized adjournment of the court, which entitles them to bail. The Circuit Court is a court of general jurisdiction, and every intendment must be made in favor of the correctness. An order of continuance is a judgment to which this rule will apply. The record shows a general order of continuance of all causes not otherwise disposed of. The testimony of the clerk cannot be received to show that there was "considerable business on the docket undisposed of," and thus contradict the record. If injury was done to the other parties whose causes were thus continued under the general order, the prisoners cannot complain of it. The court could do nothing in the absence of the prisoners, and the proof shows that they were lying dangerously wounded, at Greensboro'. It was their duty to apply to the court for the benefit of the statute, and not the duty of the court to force it upon them. If the situation of the prisoners rendered it unsafe to remove them, it was their "misfortune," and their case comes within the express proviso of the act of 1841.

8. The "term" of the court means the time that the court is actually in session, and not the time it may sit.—*Ex parte* Jos. Santee, 2 Vir. Cases, 363; Bouv. Law. Dic. vol 2, 558.

9. If the acts of 1807 and 1827 are unconstitutional, no length of time can prevent the objection from being raised.—Commonwealth v. Parker, 2 Pick. 557.

CHILTON, J.—This case has been elaborately and ably argued, and I proceed with all possible brevity to announce the conclusion which the court has attained upon the questions presented.

And, first, as to the manner in which this court shall take cognizance of the petitioners' application, so as not to render its proceeding obnoxious to the provision of the constitution, which denies to it any other than appellate jurisdiction. The petitioners are in jail, under an arrest upon a *capias*, for murder. They petitioned the Hon. W. R. Smith to be allowed bail, which, upon trial of their alleged right on *habeas corpus*, he denied them. His refusal gives them the right to come into this court to ask the control or supervision of the action of the Circuit Court—(*Ex parte* Simonton, 9 Por. 383)—for without such action, either in refusing to entertain their application or to grant it, previously had before some court or judge competent to act in the premises, we should, in such case, have nothing to revise; therefore the granting of the writ would not be appellate jurisdiction. But the writ, when granted, would only bring the bodies of the prisoners before this court, together with the cause of their detention, which is the *capias*, and not the proceedings had before Judge Smith on their application for bail, and which we must revise, or our action in the premises is original. It is the duty of this court, in order to enable it to carry out the powers with which the constitution invests it, of exercising "a general superintendence of inferior jurisdictions," to adopt such course of proceeding as will make its control complete.—*Ex parte* Chaney, 8 Ala. 424. It is important that the practice in such cases should be settled, and after the best deliberation which we have been enabled to bestow upon this branch of the case, we conceive the correct practice to be, for the prisoners, who conceive themselves aggrieved by the decision of the inferior jurisdiction, in the matter of their discharge, to petition this court for the writ of *habeas corpus*, and such other remedial process as shall be necessary to render its control effectual, setting forth under oath such a state of case as shows that the court or the judge who made the decision erred to their prejudice, and that they are entitled by the case made before such inferior tribunal, to the relief which they seek. In such cases as the present, should this court deem the showing sufficient *prima facie* to en-

title the prisoners to bail, the writ of *certiorari* would be ordered to issue to bring up the proceedings had before the judge or court below, as well as the writ of *habeas corpus* to bring the prisoners before this court, that if, upon a full hearing on the return of the writs, this court should adjudge them entitled to bail, they may be allowed to give bail in such sum as might be prescribed.

It would, however, be necessary, in cases where the prisoners desire to revise the action of the inferior court, to have the facts upon which they invoke its action set out in writing and certified by the judge, so that the same may be returned to this court as the basis of its action. Such was the practice adopted by this court, in Field v. Milly Walker, 17 Ala. 80, where we were called upon to revise the decision of the Judge of the County Court, made upon a *habeas corpus;* and it appears to be the practice which obtains in the Court of Queen's Bench in England, (see Queen v. Dunn, 12 Ad. & E. 599; S. C., 40 Eng. C. L. 124,) to issue the writ of *habeas corpus* and a *certiorari.*

It would be much more convenient, however, both to the parties and to this court, for the Attorney General or those representing the State, and the counsel for the prisoners, to agree upon the case made before the inferior court, so that when the opinion of this court is pronounced on the application for the writ, if the accused, according to the principles settled by it, is entitled to be discharged, he may renew his application to the court below, saving thus the delay and expense consequent upon further proceedings to be had in this court, and the necessity for bringing the prisoners in person before us. Such was the practice indicated in *Ex parte* Stiff, 18 Ala. 464.

Objection in this case is made to our considering the transcript of the record, and the facts stated by the circuit judge as a part of the case made below, for want of sufficient evidence of their identity with the cause. The objection can avail nothing, upon the preliminary inquiry as to whether we will award the writ; for the sworn petition sets forth the existence of such facts, and we must, for the purpose of this investigation, assume that they would be returned by the inferior tribunal, in answer to the *certiorari,* as a portion of the case, and thus be sufficiently identified.

We now turn to the main inquiry, which is, whether from the petitioners' own showing they are entitled to the relief which

they seek; for if they are not, this court will not award the writ. 3 B. & A. 420.

The facts, as presented to the circuit judge, and which appear from the transcript of the record above named, and the statement of them certified by the judge, may be thus briefly stated: The regular term of the Circuit Court for Greene county commenced on Monday the 7th day of April, 1851, but the judge of the court did not arrive at the court until Wednesday following; on that day the court commenced its session, and on Saturday of the first week of the term, the grand jury returned into court an indictment, endorsed by the foreman, "a true bill," against the petitioners, for the murder of Elijah W. Harris, and it was ordered that a *capias* issue for their arrest; on Monday of the second week of the term, being the 14th day of April, 1851, a *capias* issued for their arrest, commanding that they should be brought before the court then sitting. This *capias* was returned into court before its final adjournment, endorsed as follows: "Platt S. Croom and Pleasant May, arrested and under guard.—April 15th, 1851, (signed) O. M. Birchett, sheriff of Greene county, by Wm. M. Birchett, D. S."

It appears by the testimony of the deputy sheriff, that he held the prisoners in custody under this *capias*, until their delivery to the jailor at Eutaw, on the 20th of April, and that the reason why he did not bring them from Greensborough to Eutaw sooner was, that he was advised by several medical gentlemen that it would be unsafe to remove them earlier, on account of their wounds; but that the prisoners said nothing to him respecting their removal. Between the time of their arrest and commitment to the jail, and while they were in custody of the deputy sheriff at Greensborough, to-wit, on Friday of the second week of the term, being the 18th day of April, the circuit judge adjourned the court, leaving a considerable portion of the business of the court undisposed of, but which was continued by a general order, which he caused to be entered on the record. On the day after the court adjourned, an *alias capias* issued against the prisoners, requiring the sheriff, &c., to take their bodies and have them before the Judge of the next Circuit Court to be holden for Greene county, on the second Monday after the fourth Monday in September then next. On this *capias* the sheriff of Greene, by the same deputy, returned that the prisoners were

arrested and carried to jail—dated 19th April, 1851. The clerk of the Circuit Court testified that the Circuit Court was not adjourned in consequence of the sickness of the judge, or of his family, and that there was no particular cause assigned for the adjournment. The trial docket of the Circuit Court, as also the *venire facias* for the jury for the third week of the term, duly executed on the persons selected as jurors, were presented before the judge below on the trial for bail. The docket showed the causes undisposed of when the court adjourned. Upon the foregoing state of facts, the prisoners moved the court for bail, as a matter of right, and the same being denied them, they now insist upon their right in this court. They claim the right to be discharged on bail, under the 40th section of the 8th chapter of the Penal Code, which provides that "No person charged with the commission of an offence capitally punished, shall be admitted to bail as a matter of right, when he is not tried at the first term of the court, at which he was properly triable, if the failure to try his cause proceeded from the non-attendance of the State's witnesses, when an affidavit is made satisfactorily accounting for their absence, or where there is an entire failure to hold the court, or where the trial is delayed in consequence of the sickness of the judge, or some member of his family, or where there is a premature adjournment of the court for either of the last mentioned, or other sufficient cause; or where the judge from any cause is legally incompetent to try the accused, or where the term allowed by law is so short, that the case of the accused, according to the accustomed course of proceeding, could not be tried; or where it was found impracticable to obtain a jury for his trial; or where the trial was not completed in consequence of the sickness of a juror; or there was a mis-trial for any cause; or where the delay proceeds from the fault or misfortune of the prisoner; but if the accused shall not be tried at the next term of the court, or the failure to try his cause shall not be occasioned by his fault or misfortune, or on his application, or with his assent, he shall be discharged on giving good and sufficient bail, provided that this section shall not be so construed as to prevent a prisoner committed for a capital offence being bailed at or before the first stated term of the court, if authorized by law."—Clay's Dig. 444, § 40.

The counsel for the prisoners insist, that the premature ad-

journment of the Circuit Court, which was not occasioned by any of the causes specified in the above recited act, entitles them to bail, as a matter of right, and this right the judge below denied them. The counsel for the State oppose to this, that if such be the effect of the statute, it violates the 17th section of the Bill of Rights in the Constitution of this State, which declares, "All persons shall, before conviction, be bailable by sufficient securities, except for capital offences where the proof is evident and the presumption great," &c.

It is believed that the history of the legislation of the State, both before and since the adoption of the constitution, and the numerous decisions of this court upon similar statutes, as well as the spirit of other portions of the constitution, very satisfactorily show that the above clause in the Bill of Rights was not designed to deny to the Legislature the power to pass laws providing for bail in capital cases, where the proof was evident or the presumption great. At the common law, all cases were bailable; but it was competent for the Legislature, in the absence of a constitutional inhibition, to deprive the citizen of this right, or so to modify as to render it valueless. The clause was designed not to place a perpetual restriction upon the common law right of the citizens of the State, in the matter of bail, but on the contrary to secure by the fundamental law of the State, and to place this right, in the given cases, beyond the power of either legislative or judicial interposition; creating, however, no restriction upon the Legislature as to the excepted cases, "where the proof is evident or the presumption great." It was not the intention of the framers of the constitution to keep a party incarcerated in prison before conviction, as a punishment for the offence with which he may be charged. Until conviction, the law presumes him innocent, and merely provides for his being forthcoming for trial and to suffer its penalty, should his guilt be ascertained according to its prescribed forms. If, without any fault attributable to the accused, the judge from term to term, in the exercise of his discretion over the matter of continuances, should delay the case by reason of some want of preparation on the part of the State, it would seem strange that the same instrument which declares he shall be entitled to a speedy public trial, should provide that however long his trial may be delayed, no law shall be passed allowing him to find sureties for his ap-

pearance, and thus to discharge him from oppressive imprisonment. The same provision in the Bill of Rights was enacted by the Territorial Legislature, on the 7th Feb. 1807, which declared that "all persons shall be bailable, unless for capital offences, where the proof shall be evident or the presumption great," &c. The same Legislature, on the 10th of the same month, made provision for bail in all cases of treason or felony, where the prisoner without his fault or misfortune was not tried; and both those features, under various modifications, have existed from that time until the present.—See the statutes, Aik. Dig. 121, § 40; Toulmin's Laws of Ala. 662, § 6; Aik. Dig. 348, § 26; Clay's Dig. 444, § 40; and for the decisions of this court predicated upon them, Phil v. The State, 1 Stew. 31; Simonton's Case, 9 Por. 390; Chaney's Case, 8 Ala. 424; Stiff's Case, 18 ib. 464. Here, then is a legislative construction of this clause of the Bill of Rights which has obtained, as was well said in the argument, for near half a century, and which has been acquiesced in until now, and repeatedly acted on by this court. All this, as was very appropriately contended on the other hand, would not relieve the court from declaring the statute unconstitutional, if it amounted to a palpable or clear violation of any constitutional provision, yet it is a strong persuasive argument in favor of the law, and in a doubtful case should be considered conclusive. We should feel altogether unwarranted in holding this statute unconstitutional. It would seem somewhat paradoxical to hold, that in a *bill of rights*, the convention should have put the negative of a common law right beyond the power of legislative control, however much necessity might exist for legislative action.

Having ascertained that this statute is not unconstitutional, the next inquiry is, whether the facts and circumstances of the case before us entitle the prisoners to bail. In the solution of this inquiry, it will be proper to ascertain whether the prisoners were properly triable at the April Term of the Greene Circuit Court; for if they were not then "properly triable," the statute gives them no right to bail. What is meant by the "*first term of the court at which he is properly triable?*" Does it mean the term as prescribed by law, or the actual time the court may sit? The last construction has been urged upon us by the counsel opposed to the prisoners, and we have been referred by

them to the case, *Ex parte* Joseph Santee, 2 Va. Cases, 363. By an act of Virginia, if the prisoner was not tried at or before the *third term* after his examination before the justices, it was provided that he should be forever discharged of the crime, unless such failure proceeded from any continuance granted on the motion of the prisoner, or from the inability of the jury to agree on their verdict. In the case cited, three periods of time during which the court might have been holden had elapsed, and the question was, whether by the word term was meant the stated periods as prescribed by law, or merely the actual session of the court. Five of the judges of the general court held the latter, and the remaining four, namely, Parker, Semple, Allen and White were of opinion that the stated terms were meant. If that case can be regarded as of any weight as authority, it is upon statutes the collocation of which is different from our own. It is exceedingly clear, that by the "*first term*" is here meant the period of time limited and fixed by law during which the court was required to be holden, unless the business was sooner disposed of. Burrill's Law Dic., tit. "Term"—"Terms of Court—Terminus." Indeed, the statute could not be read with any other meaning attached to the word "term," without rendering it absurd; for it would then read that no person shall be entitled to bail, as a matter of right, when he is not tried at the first *session or sitting* of the court, *if the failure to try resulted from the entire failure to hold the court, &c.* But the meaning is manifest from other portions of the section; as, for example, the party is not entitled to bail, as a matter of right, if the failure to be tried results from the fact that *the term allowed by law* is so short that the case of the accused, according to the accustomed practice, could not be tried. Again, it says, if the accused shall not be tried at the next stated term of the court, &c. It is unnecessary to examine the other statutes, since by a proper construction of this, we think the right to bail is conferred, unless the prisoners are deprived of it for some of the causes specified.—Chaney, *Ex parte, supra.* This section clearly refers to cases which were capitally punished and in which the proof was evident or the presumption great, since the constitution gives, or rather secures the right in all other cases, and the Legislature could not interfere so as to take it away.

By the act of 1843, the Circuit Court for the county of Greene

shall commence on the second Mondays after the 4th Mondays in March and September in each year, and continue three weeks. Clay's Dig. 289, § 6. These prisoners were indicted and arrested under a *capias* which commanded them to be brought before the April Term of the court, and the sheriff made his return that they had been arrested by him and were in his custody, under guard. The court was opened for business on the 9th April; on the 12th the indictment was found, and a *capias* issued on the 14th, returnable to the court then sitting, and was executed by the parties' arrest, on Tuesday the 15th day of April; on Friday, the 18th, the court adjourned, no reason being given for the adjournment, either upon the record or by proof before the judge trying the writ. The prisoners were placed in jail on the 20th. Here then were seven judicial days of the term allowed by law unexpired when the Circuit Court adjourned, within which the party could have been tried, and within which it is fair to presume they would have been tried, had the court continued its session during the time prescribed by law. Why the judge adjourned the court before the term expired, leaving unfinished business, does not appear upon the record. It is argued, however, that we must intend sufficient cause existed, and that to allow parol proof that such cause did not exist, would be to disprove the record. Were these positions correct, it would follow that in all cases where the record failed to show the cause of adjournment, the prisoner would be concluded, notwithstanding there was a premature adjournment. We are of opinion, that if the prisoner shows that he was in custody before the adjournment, and actually in the jail in time to be tried, and would have been tried but for a premature adjournment, and the record shows no sufficient couse why the court should have adjourned, there being unfinished business, and the ability of the judge to try it being shown, the prisoner then has made out a *prima facie* case for relief. He is not required to go farther and prove a negative, that there was not sufficient cause for the adjournment, but having exculpated himself and put the court in error, it is incumbent on those opposing his discharge to prove the affirmative fact, that the court was justified in adjourning. We know of no rule of law which would justify us in going beyond the record to intend the existence of a state of facts which would deprive the party of a trial, and at the same time deny to him

his liberty upon bail. If the prisoners were required to negative by proof every cause which may be conceived of, and which may be sufficient to justify a premature adjournment, it would amount, in many cases, to a denial of the right. It is difficult to conceive where such investigation would end. We think the proof in this case, which shows the unfinished business, the general order of continuance of "all causes on the civil and criminal docket not otherwise disposed of," entered seven days before the time fixed by law as the terminus of the session, that the judge was not sick, and that no cause was assigned by him why the court was adjourned, does not in any way gainsay or controvert any fact stated in the record, and that the statute contemplates the admission of such proof. Whether the prisoners would be allowed to disprove a cause affirmatively set forth in the record, if it be shown that they had no opportunity of controverting it when made, is a question which it is not necessary now to decide. In this case, the facts shown justify the legal inference that the court prematurely adjourned without sufficient cause, such as the statute contemplates shall deny to the prisoners the right of bail.

The law makes it the duty of the judge not to absent himself from the court before the end of the prescribed term, unless the business shall be sooner disposed of—(Clay's Dig. 517, § 9)—and the general order of continuance which was made, is not such a disposition of the cases as the statute contemplates. Such continuance would follow as the result of a premature adjournment, whether the order was made or omitted. The adjournment was made, and the general continuance of all unfinished business, both civil and criminal, was ordered, in the absence of the prisoners, who were in the officer's custody, and they ought not to be prejudiced by the failure of the judge to continue the court until the business was disposed of, or until the end of the stated term, should the business require it.

But when the court adjourned the prisoners were at Greensboro', some miles distant from the court-house, and the sheriff was advised that it was unsafe to remove them. This would most unquestionably have justified the court in adjourning upon disposing of the other business, without waiting to see whether they would sufficiently recover from their wounds to be brought up for arraignment and trial; and in justice to the presiding judge, it would be proper

to remark, that we have no doubt but that in adjourning the court without disposing of their case, he was influenced by the belief that they could not be tried at that term, with safety to themselves, for we should be sorry to be understood as imputing to him any wilful disregard of duty. Nevertheless, the prisoners have the legal right to say to the court, "we were arrested and held in custody by your order, and the indictment, to answer to which we were held in custody by your officer, stood upon your docket for trial. Had the business been progressed with according to law and the practice of the court, we should have been ready on Monday of the third week, if not when arrested, to have responded to the charge. It would then have been your duty to set apart a day for our trial, (Clay's Dig. 296, § 37,) as it was likewise your duty "to deliver the jail of all persons committed for murders," &c., and as the constitution entitled us to a speedy public trial, which without our consent has been denied us, we claim the right consequent upon that denial, of being discharged on bail." It is no answer to say to them that they prayed no trial. Their response is, that they were prisoners and unable to move but by the court's order; neither have we any statute making their right to bail depend upon their being active in obtaining a trial, or applying for bail during the sitting of the court. In this our statute differs from 31 Car. 2. But the case is put, by way of illustrating the supposed unsoundness of the position that the prisoner may have bail without presenting himself to the court during its session and demanding a trial: "Suppose a prisoner at large absconds until after the court adjourns, but before the term as prescribed by law expires, can he come in and claim bail?" This is not the case before us, but the principle which we here assert would not extend to such case; for the court in the case supposed would not, at the time of the adjournment, have the custody of the party indicted, and the law would impose no duty upon the court in respect to him, but to issue process for his arrest and forthcoming at the succeeding term; and the same may be said of a person who is indicted but not arrested until after the court adjourns. His was not, at the time of the adjournment, a portion of the unfinished business which stood calendared for trial at that term. Not so, in the case before us, for here the parties were in custody on the 15th, and the court adjourned on the 18th of April.

But it may be said, the court must be presumed to know that when the adjournment was made, the parties could not have been tried by reason of their wounds, and had the right to continue their cause for that reason, otherwise it must remain in session during the whole stated term; or if it be the last court holden on the circuit which is not limited as to duration, the judge must keep the court open until the succeeding term shall arrive. This does not follow; on the contrary, if the court has *disposed of the business* as contemplated by the statute, and according to the practice the cause comes up as the remaining business, the court puts the party upon a continuance or trial, and if unable to get into court, this furnishes sufficient reason for a continuance in his absence. It is the prisoner's misfortune that his condition from sickness or wounds may prevent his trial. Although the party may be unable to get into court on the 18th, he will be able on the 20th, and the business of the court required by law to be transacted will require its session beyond that period. So that the prisoners show their case was properly triable at the April term, and that a trial was denied by a premature adjournment of the court, which the unfinished business did not authorize, nor the condition of the presiding judge require. They have a right to insist that the practice of the court, as regulated by law, and which would have *prima facie* secured them a trial, should have been observed.

Upon the facts we have stated, as shown by the petition and accompanying papers, we have arrived at the conclusion that the petitioners were entitled to bail, and that the writ of *habeas corpus* and *certiorari* to bring up to this court the prisoners, as also the proceedings had before Judge Smith, issue, unless the counsel engaged are satisfied no new phase would be presented by the return, and are content to apply to the judge below for the relief which they seek, as hereby indicated.

We regret that in a case involving such important points of practice, as well as the construction of constitutional provisions, we have been deprived of the aid of the Chief Justice, by reason of his severe illness. The necessity, however, for an immediate opinion, forbade our delay.

July 22.—We have not entered into the discussion of the construction of the act of 1827, (Aik. Dig. 348, § 36,) so ably insisted on by the counsel opposed to the prisoners, for the rea-

son that we regard that construction as settled by our predecessors, against the view of the learned counsel, in the parallel case of Simonton, 9 Por. 383-90, in which the parties were indicted and arrested upon writs of *capias* returnable to the same term of the court at which the indictment was found, and for the failure to try at which term, the prisoner was admitted to bail; and this case was re-affirmed, in *Ex parte* Chaney.

Since the foregoing opinion was prepared, the Chief Justice has so far recovered as to be able to examine it, and he requests me to state that he fully concurs in it.

Upon further consultation by the whole court, it is deemed proper to observe, lest what we have said about the general order of continuance of the business in the Circuit Court of Greene might mislead the judge upon a future application for bail, that if it should appear upon subsequent investigation that such general order was made at the suggestion or by the consent of the parties, whose cases were continued, or their counsel, the order would then operate as a continuance entered in each case by consent, and would be a completion of the business of the court, justifying its adjournment. This, although clearly inferrable from what we have previously said, may prevent any misconception of our view, as to what constitutes a premature adjournment.

POWELL *vs.* THE STATE.

1. When the judgment entry recites that the jury after deliberating a reasonable time were unable to agree upon a verdict, that the court had disposed of the business before it, and that it was absolutely necessary that the term of the court should then be closed, the jury may properly be discharged and a mistrial entered.
2. On the trial of an indictment for murder, the defendant cannot prove threats made by the deceased against him, without also proving that such threats came to his knowledge before the killing.
3. A witness cannot be impeached by proof of contradictory statements previously made by him, whether oral or written, without first giving him an opportunity to explain such previous statements.

ERROR to the Circuit Court of Shelby. Tried before the Hon. Geo. D. Shortridge.

WATTS, JUDGE & JACKSON, and WOODWARD, for plaintiff:

1. The prisoner ought not to have been tried the second time. The discharge of the jury for no better reason than that they could not agree, is not authorized by law, and the prisoner cannot be legally tried again.—See Ned v. State, 7 Por. 187. In principle this case cannot be distinguished from the case cited from 7 Por. 187. Here the jury was really discharged because they could not, or rather, had not agreed, by 9 o'clock Saturday morning. The term of the court had not expired; it continued until 12 o'clock Saturday night.—See State v. Nabors, 6 Ala. 200. It is untrue, as stated on the record, that the business of the court was finished. This case was at that time pending in the court undetermined, the jury were then out trying it, and it was the business of the court to try and determine this case. Until this case was legally disposed of it is clear that the business of the court was not finished. The general expression in the record that it appeared to the court that "it is now absolutely necessary that the term of the court be closed;" cannot amount to any thing. There is no reason stated in the record why it was absolutely necessary. The reason should have appeared upon the record.—See May & Croom v. State, decided at present term.

The case of Battle v. The State is unlike this. The judgment entry of the mistrial in that case is, "and it appearing to the court here now that it is absolutely necessary that the jury be discharged, for that the term of this court is now closed." In the case now before the court the term of the court had not closed, and it could not, without disposing of all its business, legally close, and the term did not legally end until 12 o'clock Saturday night. In this case it is only shown that it is necessary that the term of this court be closed, not that it had closed by expiration of its term. It could not legally close otherwise until all the business of the court had been disposed of, or unless the judge was sick, or some other cause provided for by statute.

The loose expressions of Judge Collier in Battle v. State, *supra*, were not necessary in that particular case, and must properly be considered as mere *dicta*, and especially ought these loose

expressions to be so regarded when we see clearly that they are inconsistent with Nabors v. State, (6 Ala.) and particularly opposed to the reasoning of Judge Goldthwaite, in the case of Ned v. State, (7 Por.) one of the most elaborately considered opinions and cases ever reasoned or argued in our court. Upon the principles settled in that case, we rely confidently in saying that the court erred in this case.

2. The testimony offered as to the declarations of the deceased was competent, as rebutting the evidence of the State. It was competent for the purpose of showing that the defendants had good reason to go armed to defend themselves on their own soil, where they had a right to be. It ought to have been left to the jury, from all the circumstances to infer whether the defendants had been informed of the threat. The court undertook to determine that the jury could not, from circumstances, infer that the defendants had been informed of it.

3. The affidavit of Grady before the magistrate ought not to have been excluded; it was proper to impeach the witness in this way.—See Heirs of Holman v. Bank of Norfolk, 12 Ala; see also Carville v. Stout et al., 10 ib. 802; 1 Greenl. on Ev. § 462, which shows that the rule which requires a predicate to be laid before the witness can be contradicted, applies to oral declarations or statements. The oath could not be explained.

Attorney General, for the State:

1. The threats of the deceased against the accused could have had no influence upon the latter unless they came to his knowledge before the killing, and they were therefore properly rejected by the court.—Hudgins v. State, 2 Kelly 181; Turney v. State, 8 S. & M. 123; State v. Goodrich, 19 Verm. 116, and 6 Georgia Dec. 88.

2. To show that the court properly refused to admit the preliminary examination of witness Grady, no sufficient predicate having been laid, see Howell v. Reynolds, 12 Ala. 131.

COLEMAN, J.—This was an indictment for murder against William Powell, William Blair and Hancock Holcombe, in the Circuit Court of Shelby county. On the trial in the court below, William Powell was convicted of manslaughter in the first degree and the other defendants acquitted.

At a term of the court previous to the conviction of the prisoner, a mistrial was had in the case, in which the judgment of the court recites "that the jury retired to consider of their verdict, and having well and truly considered of the same, return into open court and say they cannot agree upon a verdict, and it appearing to the court now here, that the business of this court is finished and that the said jury have been charged with this case from Thursday evening at 5 o'clock until 9 o'clock this Saturday morning, and they say it is impossible for them to agree on a verdict, and it appearing that it is now absolutely necessary that this term be closed, it is therefore ordered by the court that the said jury be discharged, a mistrial entered, and that the cause stand for trial at the next term of this court."

On the subsequent trial of the prisoner, at which he was convicted, no objection was urged in his behalf on account of the mistrial, but it is now insisted that the discharge of the jury was illegal and is equivalent to an acquittal.

The general rule, as laid down by the highest authorities on the criminal law, is that a jury once sworn and charged in a case affecting life or member, cannot be discharged without giving a verdict. Amongst the exceptions to this rule is this, that a court may discharge a jury in any case of pressing necessity, and should do so whenever such a case is made to appear.

If the term of the court were closed by adjournment on account of the sickness of the judge, or any other sufficient cause, it would certainly justify the discharge of the jury. In the judgment entry above referred to, the court declares that it is now absolutely necessary that this term of the court be closed. The judgment does not specify what the particular cause of the adjournment was, but states that it was one of absolute necessity, and being a court of general jurisdiction, every intendment must be made to sustain the correctness of the judgment. In the case of the State *ex. rel.* Battle, it was held that after a Circuit Court has disposed of the business before it, it need not continue its session until the expiration of the term limited by law, although a jury may be deliberating upon their verdict in a criminal prosecution for a criminal offence; in such a case the court is only bound to afford a reasonable time for the jury to agree upon a verdict, and if the record does not show the reverse, it will be intended that the session continued thus long.

It is not necessary to go the extent of the doctrine here laid down, to show that the jury was properly discharged in this case. The record shows, not only that the court had disposed of the business before it, and awaited a reasonable time for the jury to agree upon a verdict, but the judgment entry shows that it was considered by the judge that the term of said court should be then closed from some absolute necessity.

We think the court properly excluded the threat of Porter and his declaration concerning the field, as stated in the bill of exceptions. It appears that the admission of the threats, &c., as proof was objected to unless the defendants would prove that information thereof was communicated to them before the killing, which the prisoners failed to prove. The threats, if made known to the prisoner, would have been competent testimony, as tending to show, that in the assault on the deceased, he may have acted under a just fear of danger to his own life, but we cannot see in this case how they could be considered as proof pertinent to the issue. The eminent counsel for the prisoner have failed to produce any authority for the admission of such proof. They insist that it ought to have been permitted to the jury to infer from the circumstances that the prisoner had knowledge of the threat. No circumstances from which such an inference might be drawn, are disclosed by the bill of exceptions, and if such existed, it was obligatory on the defence to show them affirmatively.

We will not undertake to say that no case could occur, in which such threats, although unknown to the prisoner, might be admissible, but we think there is nothing in this case to authorize their admission.

In order to impeach the evidence of Grady, a material witness for the State, the prisoner offered the written testimony of the witness given before the committing magistrate, as materially different from what he swore on the trial. This was excluded by the court, because, as stated in the exceptions, no predicate had been laid, that is, the witness had not first been examined as to the time, place, and circumstances of the previous statement.

The rule acted on by the court in this case is the rule established by the judges in the Queen's case, and which has been fully recognized by this court.—Howell v. Reynolds, 12 Ala. 128. A witness cannot be impeached by proof of contradictory

statements made by him, whether oral or in writing, without first giving him an opportunity to explain the nature, circumstances and meaning of what he stated or wrote at a previous time. The reason of the rule is, that he may have it in his power to explain the apparent contradiction, and the rule is the same, whether the previous declaration of the witness be written or verbal.—1 Greenl. § 463; 3 Starkie's Ev. 1714.

The judgment is affirmed.

Ex Parte ANDREWS & WIFE.

1. When a prisoner is committed for an assault with intent to kill and murder, and it is shown that the person wounded is in danger of dying before the expiration of a year and a day from the time the wound was inflicted, the prisoner is not entitled to bail, as a matter of right, because no indictment has been found against him although two terms of the court at which he might have been indicted have elapsed since his commitment, unless it is also shown that he would be entitled to bail if death should ensue within the year and day.

Application for the writs of *Habeas Corpus* and *Certiorari*, to obtain the discharge of the petitioners from imprisonment, bail having been refused them by the Hon. Alex. McKinstry, Judge of the City Court of Mobile.

Phillips, for petitioners:

The rule of the common law is "that no person shall be adjudged by any act whatever to kill another, who does not die thereof within a year and a day after the stroke received."—1 Russel on Crimes, 428. The ruling of the court below is, that the party charged with giving the blow may be detained in prison until the expiration of the year and day, and that there is no statute making it compulsory on the State, until the completion of that period, either to indict or try him, or to discharge him on bail.

It is provided by the sixth section of the act of 1807, that "if any person shall be committed for treason or felony, and shall

not be indicted and tried at the next term of the court," &c., he was entitled to bail on the last day of the term; and if not indicted and tried at the second stated term, he was to be discharged from imprisonment, except in certain specified cases. This section is almost a literal transcript of the *habeas corpus* act.—31 Car. II, C. 2, § 7. If this act is still in force the petitioners certainly are entitled to bail. The offence for which they were committed is a felony, (Hughes v. State, 12 Ala. 458,) and two terms have passed since their commitment without an indictment being found against them.

The act of 1827 was passed to amend that of 1807, and does amend it in one particular, and that is to require bail on failure to indict and try at the second term.—Aikin's Dig. 348. The only difference in the wording of the two acts is, that the latter uses the expression "and shall not be tried," instead of "indicted and tried," as in the former act. The provision in the Penal Code is, (Clay's Dig. 444, § 40,) that "no person shall be admitted to bail as a matter of right, when he is not tried at the first term," &c. The terms of statutes are operative, except wherein they have been repealed, and if the word "indicted" gives a protection to personal liberty, which the word "tried," standing alone, would not give, then the statute of 1807 is in full force as to that word.—Kinney v. Mallory, 3 Ala. 626; *ex parte* Simonton, 9 Por. 391.

Independently of these provisions the petitioners are entitled to bail. The *habeas corpus* act of 1807 declares, that "any person detained in prison for any criminal or supposed criminal offence, unless for treason or felony punishable with death, the species whereof is plainly and fully set forth in the warrant of commitment," may be admitted to bail.—Aikin's Dig. 347. Our Bill of Rights thus secures the same privilege: "All persons shall, before conviction, be bailable by sufficient securities, except for capital offences, where the proof is evident and the presumption great." The offence for which the petitioners were committed is clearly bailable under all of these provisions.

The prisoners were detained by the court below on the ground that these statutes all related to complete offences, that the offence in this case would not be complete until the death of the party wounded, and that his mere order to the sheriff to detain them in custody, would be good, if not extended beyond "a year

and a day." The authorities referred to for this position are 1 Strange 547, and 15 Mass. 276. The first of these cases was probably decided under the statute against stabbing.—1 Jac. 1, C 8, cited in 3 Chitty 347.

In the second case, it appears that the grand jury presented the fact. Whether this was done under some rule or special statute of Massachusetts, I have not been able to determine. The reference to Hale by the reporter shows that the decision rests on an English statute, and the statute itself seems to have been made for the government of sheriffs and bailiffs.—2 Hale's Pleas of the Crown, 132.

No counsel, *contra*.

CHILTON, J.—The petitioners apply to this court for the writ of *habeas corpus* and *certiorari* to bring up the proceedings had before the Judge of the City Court on their application before him on a similar writ, he having refused to admit them to bail. By the consent of the solicitor the issue of the writs is waived, and the record accompanying the petition is considered as duly returned.

It appears from the record that Abram Andrews was committed for an assault with intent to commit murder on one James A. Donalson, on the 27th March, 1851, and his wife Margaret on the 28th of the same month, as an accessory before the fact. Since their commitment, two terms of the City Court have elapsed, and no indictment has been found against them. And the reason why the judge refuses them bail is, that Donalson is shown by the proof of a surgeon to be in such condition, from the wound inflicted by the prisoner, Andrews, that in the opinion of the surgeon, he will die before the next term of the court, which will be within a year and a day from the time the wound was inflicted; and we are left to infer from the record that the party is detained in custody, and not indicted for the minor offence, in order that should death ensue, the solicitor may prefer an indictment for murder.

The bail is claimed as matter of right from the facts above stated; and for the purposes of this investigation we will assume that if Donalson should die, the facts would be such as to bring the case within the constitutional exception as to capital offences, "where the proof is evident and the presumption great;" for,

if the facts do not bring the case within such exception, the prisoners would be entitled to bail, to appear and answer for the murder, should the party die.

We have carefully examined the able argument submitted in writing by the counsel for the prisoners, but have been unable to persuade ourselves that the statutes contemplate, that parties situated as the record and proof show these are, are entitled to be indicted and tried, before it is ascertained whether the capital felony will be consummated by the death of the wounded person. The statutes make no provision for cases of this kind, and we are thrown upon the constitutional provision and the common law governing such cases. It is very certain, we think, that the act of 1807, which authorized the discharge of the accused, if not indicted at the second stated term, was never intended to embrace a case like the present. True, the parties are charged with what the statute makes a felony, but the court is advised that the party wounded will die before the next court, in which event, as we have said, we must assume as the predicate for this opinion, that a more aggravated felony, a capital offence, will have developed itself. It cannot be true that the Legislature designed to compel the State to try the offender for the minor offence, and thus exonerate him from liability for the greater, or on default of indicting him for two successive courts, entirely to discharge him. Neither do the acts of 1827, nor the provision in the Penal Code, (Clay's Dig. 444, § 40,) embrace the case or confer any right to bail; they refer to trials and commitments for offences which have been consummated. Here the party could not be indicted, for the offence, though it may be morally certain that it will be completed by the death of the party wounded, has not yet been consummated. We have been referred to no case, where, under such circumstances, the State has been compelled to indict, or where the prisoner has been discharged for a failure to try until after the time has elapsed within which, if the wounded person die, the law would adjudge it murder.

It is laid down by the Supreme Court of Massachusetts, in The Commonwealth v. Caleb Trask, (15 Mass. 277,) "that where one is imprisoned for dangerously wounding another, so that his life is in danger, he is to be kept in prison without bail, until it shall probably appear that the danger is over." And the court predicate their opinion upon what Lord Hale observes in his

Pleas of the Crown, (vol. 2, p. 134,) who says: "If A dangerously wound B, he may be imprisoned till it be known whether the party will die or live, and regularly is not to be bailed, till it probably appear that the danger is over."

Our opinion is, that if the facts of the case made by the prisoners are such as entitle them to trial as matter of right under the constitutional provision; in other words, if they are such that in the event of the death of the party wounded, they would be entitled to bail, they ought not to be denied bail, because the party injured still survives. But unless they can bring their case within this category, as there is no statute which requires the court to bail them, and the purposes of justice, in the event that a capital felony will shortly be consummated, can only be carried out by securing the prisoners to answer for the offence; they must remain in prison until it may be seen whether the wounded party will live or die.

Let the motion be denied.

PETTIBONE *vs.* THE STATE.

1. An indictment under the fifth section of the act of 1850, (Pamphlet Acts, p. 11,) for keeping a hotel without license, which alleges that the defendant "*did keep*," &c., is demurrable. It should allege that he "*was engaged in the business of keeping*," &c.

ERROR to the Circuit Court of Conecuh. Tried before the Hon. E. Pickens.

THE plaintiff in error was indicted, under the act of 1850, for keeping a hotel without license. The indictment contained two counts, the first alleging that the defendant "did then and there keep a house of entertainment for transient persons," &c., and the second that he "did then and there keep a hotel," &c. The defendant demurred to the indictment, but his demurrer was overruled, and a verdict rendered against him.

WATTS, JUDGE & JACKSON, for plaintiff in error, contended that the indictment was defective, because it did not charge that the defendant was engaged in the business of keeping a house for the entertainment of transient persons; and they cited Moore v. The State, (16 Ala. 411,) and Eubanks v. The State, (17 Ala. 181.)

THE ATTORNEY GENERAL, *contra.*

COLEMAN, J.—According to the decisions made in the cases of Moore v. The State, (16 Ala. 412,) and Eubanks v. The State (17 ib. 181,) the court erred in overruling the demurrer to the indictment in this case. The act of 1850, (see section 5,) under which this indictment was found, is substantially the same with the 98th section of the act of 1848, under which the indictments were found in the cases referred to.

The judgment is reversed, and the cause remanded.

HUGGINS *vs.* BALL, CLERK, &c.

1. The act of 1848 (Pam. Acts, 95) "to amend the several laws now in force in relation to the return of executions by sheriffs and coroners," does not repeal the act of 1840, (Clay's Digest 311, § 31,) "to regulate the mode of collecting costs accruing in the Supreme Court."
2. The Circuit Court has jurisdiction to render judgment under the act of 1840, against an officer for a failure to return an execution to the Supreme Court, although the amount of the judgment may be less than fifty dollars.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

PERCY WALKER and A. F. HOPKINS, for plaintiff in error:

1. The act of 1840 is repealed by the act of 1848. A subsequent statute will control a former act which is repugnant to it; and it makes no difference that one is a general act and the other special.—21 Pick. 373; 4 ib. 399; 3 Ala. 626; 3 Mc-

Lean, 212; 7 Blackf. 314; 7 Mass. 140; 12 ib. 545; 1 Ashmead, 179; 10 Pick. 39; 20 ib. 407. The language of the act of 1848 is plain and unambiguous, and leaves no room for construction. The intention of the Legislature must be collected from the words which they employ.—9 Por. 266; 1 Kelly 157; 2 Cranch 399; 14 Peters 46; 3 How. (U. S.) 1; 9 Wheaton, 381; 9 N. Hamp. R. 59; 5 Pick. 166; 3 J. J. Marsh. 594; 1 Hill 324; 17 Ala. 828.

2. The judgment is erroneous as to amount. It should have been twenty per cent. on the amount of the execution, instead of the whole amount.

3. The Circuit Court has no jurisdiction to render judgment for less than fifty dollars.—Clay's Dig. 288, § 2.

C. W. Rapier, *contra:*

1. The act of 1840 is not repealed by the act of 1848.—1 Kent's Com. 461; 6 Smedes & M. 628; 6 Por. 220; 3 Martin's R. 190; 24 Pick. 296; 23 ib. 93; 3 Mass. 523; 9 Bacon's Abridgment 255; 3 Bibb 180; 4 Pike (Ark.) 410; 3 Ala. 626; 5 Hill 221.

2. The recovery is in the nature of a penalty, and the summary proceeding is not a civil case within the meaning of the constitutional provision in reference to jurisdiction.—5 Por. 145; 9 ib. 460.

COLEMAN, J.—The proceeding and judgment in this case were had under the act of 1840, authorizing the clerk of the Supreme Court, in the name of the successful party, to commence and prosecute any motion against any sheriff or his securities for failing to return any execution from the Supreme Court. By a further provision of the act, and those acts to which it refers, the plaintiff was entitled to recover against the sheriff the amount of the execution which he failed to return.

It is contended that this act was repealed by the act of 1848, which declares that "from and after the passage of this act, when any writ of execution shall come to the hands of any sheriff or coroner, and he shall fail to return it to the office from which it issued, on or before the return day thereof, it shall be lawful for the court to which said execution may be returnable, upon three days notice being given by either party thereto, and

on motion of the plaintiff or plaintiffs, defendant or defendants, in said execution, to render judgment against the sheriff or coroner thus failing and his securities on his official bond, or any or either of them, at the rate of twenty dollars for every hundred dollars contained in the judgment or decree on which the execution issued, and so in proportion for any greater or less sum, and no more." The third section of this act repeals all laws and parts of laws contravening its provisions.

By the acts of 1819 and 1821, the plaintiff was authorized to recover against the sheriff the amount of any execution which he failed to return according to law, and we think the Legislature intended by the act of 1848 to repeal those general acts and not the special act of 1840.

When an act of the Legislature admits of two constructions, the one violative of the constitution and the other not, we ought certainly to give it the latter construction. If the act of 1848 were construed to repeal that of 1840, it would give to the clerk of the Supreme Court the right to proceed in that court against the sheriff for failing to return an execution, and thus create the necessity of having a jury to try the issues that might arise in the case, and confer original jurisdiction on the Supreme Court. Such a law would clearly be unconstitutional.

Again: in interpreting statutes, we should certainly not favor any construction that would lead to an unreasonable result. If the construction contended for by the plaintiffs were to prevail, a sheriff in the remotest county in the State might be required to attend this court and defend a motion against him on three days previous notice thereof.

It is contended that the Circuit Court had no jurisdiction in this case, the amount claimed and recovered being twenty-five dollars sixty-three cents. The constitution declares that the Circuit Courts shall have jurisdiction in civil cases only when the matter or sum in controversy exceeds fifty dollars. We think this is not a civil case within the meaning of the constitution, but a proceeding had for the recovery of a fine or penalty against a public officer for a default or dereliction in his official duty. Actions founded on torts are civil cases in one sense of the term, but the jurisdiction of the Circuit Court in any case of tort has never been doubted, however small the matter in controversy. We consider the default of the sheriff in this case

to be in the nature of a tort. When any injury is sustained from the neglect of duty on the part of an officer, an action *ex delicto* is the appropriate remedy.

Let the judgment below be affirmed.

DARGAN, C. J., not sitting.

DOSS *et al. vs.* CAMPBELL.

1. The laws of the State in which a marriage is celebrated govern the rights of each party to the property of the other, and their subsequent removal to another State only affects property afterwards acquired.
2. Therefore, where a marriage was celebrated in Texas, by the laws of which the husband acquires no interest in his wife's property by the marriage, the subsequent removal of the parties with their property to this State does not subject the wife's property to the husband's debts.

ERROR to the Circuit Court of Dallas. Tried before the Hon. Geo. Goldthwaite.

CAMPBELL, for plaintiff in error:

We contend that the *lex rei sitæ*, and not the *lex loci contractus*, must govern.

Giving operation to a foreign law, rests in mere comity. All that relates to the remedy must be determined by the *lex fori*. Pickering v. Fisk, 6 Ver. 102; 2 U. S. Dig. 437, § 24.

The distinction between real and personal actions at civil law, is taken and exemplified in Saul v. His Creditors, 3 La. 585; Story's Confl. of Laws, § 157; Lord Eldon's Doctrine, cited by Story, (Confl. of L., § 171;) see also § 174.

The idea of tacit contract, is that upon which the prevailing of the law of the matrimonial domicil is founded. This idea is repudiated by the Supreme Court of Louisiana.—See Saul v. His Creditors, 17 Martin's La. 599; Story's Confl. of L., § 157; Ib. 148; 17 Martin's La. 569-603-605; Story's Confl. of L., § 190;

Dickson v. Dickson, 4 La. 190; Selrigg v. Davis, 2 Rose's B'k Cases, 99; Lashley v. Hogge, Robinson's Appeal Cases, 160; Royal B'k of Scotland v. Smith, 1 Rose's App. C., Appen. 181.

It may be admitted, (says Mr. Story's Confl. of L., § 145, A,) that the rights dependent upon nuptial contracts are to be governed by the *lex loci contractus*. This may be generally correct in regard to cases of express or implied contracts, and that no other were probably in the mind of Chancellor Kent at the time he gave the decision.—De Couche v. Savetier, 3 Johns Ch. 211; Story's Confl. of L., § 145, A.

The personal laws of one country cannot control the personal laws of another, *ipso facto*. No one can doubt that any country has a right to say that contracts for community made in another country shall have no operation in its own territory. The question then is reduced to the mere consideration, whether the law of the country does directly or indirectly provide for or repudiate the community of property locally situated within it.—Story's Confl. of L., § 175; Ib., § 176; Ib., §§ 33-4-278.

If a husband by the law of his domicil has his wife subject to his control, and changes his domicil to a place where it does not exist, or *e contra*, if he changes his domicil from a place where the wife is exempt from the matrimonial power, to one where it exists, in such case the wife has the capacity or incapacity of the new domicil.—Story's Confl. of L., § 131; Lashley v. Hogge, Rob. App. Cas. 160; Selrigg v. Davis, 2 Rose's B'k Cases, 99.

GAYLE, *contra*:

1. There is no difference between a marriage settlement by deed, and a contract of marriage created by law. The object of each would be to settle the property on the wife to her separate use. If the contract in question were by deed made in Texas, the property would be protected here.—See Peake v. Yeldell, 17 Ala. 636.

2. Under the tacit contract, the title is vested in the wife, to her separate use. In Texas, it was the wife's property in fee, and not to be charged by the husband. Can a wife's rights, so important as these, be divested by following her husband, as she is bound to do, into another State?

3. The doctrine contended for applies to real estate, but not to moveables.—See Gale v. Davis, 4 Martin, 649.; see Story's

Confl. of L., 200, §§ 186-240-2; 2 Kent's Com. 453-4-7; 14 Conn. 583.

4. But, independent of our statute, the principle settled by Story and Kent, *supra*, has been recognized by our court, in cases analogous in principle. Our court, in enforcing contracts made in other States, apply the statute of limitations in other States—the tacit contract of the parties.—See Goodman v. Monks, 8 Por. 84.

These decisions must be overturned to arrive at the conclusion contended for by plaintiffs in error in this case.

DARGAN, C. J.—The slaves in controversy belonged to the wife of the claimant before their intermarriage; they resided in Texas at the time of the marriage, and the wife had the slaves in her possession; they afterwards removed to Alabama, bringing the slaves with them; the husband being in possession of the slaves, they were levied on in this State, to satisfy a debt owing by him. It was also shown, that by the laws of Texas the husband acquired no title to the property of the wife, in consequence of his marriage, but that she retained it to herself as her separate property. Upon these facts, the question arises, whether the slaves are liable to the debts of the husband.

We do not deem it necessary to enter into the discussion of the intricate question between real and personal statutes, nor the influence the act of the Legislature of Texas would have on the rights of the husband, if it be considered in the one light or the other. For, in our opinion, without regard to the character of that statute, (that is, whether it be considered as a real or personal statute,) the plain and simple rule is this, the *lex loci contractus* must govern, not only as to the validity of the marriage itself, but also in ascertaining the rights which each party takes in the property of the other and which either owned at the time of the marriage. But if they remove to another country or State, and there acquire property, the rights of each to such property, acquired after the removal, must be governed by the laws of their newly acquired home. Thus, if parties are married in a country where the common law prevails, the husband by virtue of the marriage acquires title to all the personal property of the wife which she had in possession at the time of the marriage, and their subsequent removal to a country where the

civil law prevails, will not re-invest her with a right to any portion of it, but all the property acquired subsequent to their removal will be governed by the laws of their newly acquired domicil; and she will take the same interest therein as if the marriage had been there celebrated. So, on the contrary, if they were married in a country where the civil law prevails, and afterwards remove to a State governed by the common law, the common law will regulate their future conduct and future acquisitions; but the removal will not alter the rights of either to property *then* in possession, the title to which had vested under the civil law. This is the rule recognized in the case of Gayle v. Davis' Heirs, 4 Martin's La. 645; nor is there any thing inconsistent with this principle, in the case of Saul v. His Creditors, 3 Cond. La. 563. Judge Story, in treating of these two decisions, considers that they *recognize this rule:* "where there is no express nuptial contract, the law of the matrimonial domicil is to prevail, as to the antecedent property; but the property acquired after the removal is to be governed by the actual domicil."—Story's Con. of L., § 1780. This rule is plain and simple, and commends itself for its justice and equity, for there can be no justice in permitting the husband to acquire title to all the property of the wife, simply by a removal from one State to another, especially when we consider that he can control the domicil of the wife. It is true, that if it were contrary to the laws of the actual domicil to allow married women to own property separate from their husbands, then their title to such separate property could not be protected by those laws. But no good reason, in my judgment, can be assigned why the husband should acquire title to all the property of the wife by a removal to a country that recognizes the right of married women to own separate property. The removal of Campbell and wife from Texas to this State worked no change of title to the property they respectively owned, and the court therefore committed no error in the instructions given to the jury.

The other questions growing out of the assignment of errors, we have examined, and deem it sufficient to say we can perceive no error in the record, and the judgment must be affirmed.

PALMER *vs.* BENSON, Adm'r, &c.

1. A testator bequeathed to his eldest son the sum of five dollars, alleging that he had been undutiful, and also provided that after each of his other children had received the sum of four thousand dollars, he should receive an equal share in the remainder to be divided among them. By another clause the testator directed that his other children should share equally in his estate, that all his property should be kept together until his daughters married and his sons became twenty-one years of age, and that all of his landed property should be sold on his youngest son's arriving at the age of twenty-one years, and the proceeds divided as his other property. He also bequeathed to one of his daughters, who was married, three negroes and their increase, and directed that on a division of his property they, but not their increase, should be returned and appraised. *Held*, that the eldest son could not have a division of the estate until the youngest son had arrived at the age of twenty-one years, and that after each of the other children had received four thousand dollars, he might share equally in the remainder.

Error to the Court of Probate of Wilcox County.

John Palmer petitioned the Court of Probate for a distribution of the estate of his father, Stephen Palmer, deceased, and alleged in his petition that more than eighteen months had elapsed since the grant of letters of administration on the estate, and that the estate was out of debt and in a condition for distribution. The petition was opposed by the administrator on the ground that the petitioner *at that time* was not entitled under the will to any part of the estate except the sum of $5, therein bequeathed to him. The clauses of the will whose construction is involved in the decision of the court, are in the following words:

1. "I will and bequeathe unto my son, John Palmer, the sum of five dollars, to be paid him by my executors, (my reason for making this bequest is, that I consider that he has been undutiful to me as a son and has damaged me considerably by his conduct,) but desire and request, after all my other children have received the sum of $4,000 each, he may receive an equal share in the remaining balance to be divided among them."

2. "I will and bequeathe unto my daughter, Evalina McKee, one negro woman by the name of Fibby and her two children,

and their future increase; nevertheless, at a division of my property among my heirs at law to be returned and appraised without any increase which subsequently occur with them."

3. "My will and request is, that my children of the following names share equally in my estate, viz:" (naming all of them except John Palmer,) "and that all my property remain in common together until my daughters marry and my sons become of the age of twenty-one years; and I desire all of my landed property be sold on my youngest son becoming of the age of twenty-one years and not before, divided as herein before mentioned."

The Court of Probate decreed that a division of the estate could not be made until the youngest son had arrived at the age of twenty-one years, to reverse which decree the petitioner sued out a writ of error to the Supreme Court.

WATTS, JUDGE & JACKSON, for plaintiff in error.

No counsel for defendant.

CHILTON, J.—The Judge of the Probate Court decided this case right. If it had been the intention of the testator to have the shares to which his children would be entitled in his estate apportioned off upon the marriage of his daughters respectively, and the attainment of the age of majority of his sons, he would hardly have postponed those who were married and were of age at the time of making his will, but would have provided for their coming into possession of their shares immediately, or as soon as the same could have been apportioned off to them consistently with the proper administration of his estate. So far from this, he makes a provision for his married daughter, Mrs. McKee, who was of age, in the specific bequest of three slaves, and seems to contemplate that these slaves will increase before the final division, at which time the three slaves so given, but not their increase, are to be returned and appraised.

Again: he requires that all the property is to be kept together in common, and all his landed estate is to be sold when his youngest son arrives at the age of twenty-one years. If it be true, as contended by the counsel for the plaintiff in errror, that each heir upon arriving at age, or the daughters upon their respective marriages, are entitled to their shares, to obtain which the whole estate, embracing the land, must be valued, the result

would be to throw the youngest child entirely upon the land for his share, if it be equal in value to one share, which we are quite sure was never contemplated by the testator. Indeed, the will expressly provides for the contrary, by requiring the proceeds arising from the sale of the land to be divided as the other property. So that, aside from the positive direction that *all* his property shall be kept together in common until his sons arrive at the age of twenty-one, &c., other portions of the will sufficiently indicate an intention to postpone the division until the majority of the youngest son. The fact that it would be unreasonable and impolitic to retain the land after the slaves, whose labor may be supposed to have rendered it productive, shall have been apportioned off among the distributees, may furnish an additional consideration in arriving at the conclusion that the testator did not intend to have a division of his slaves before his land was sold. We are satisfied, from the whole will, that the plaintiff in error can have no division until the youngest son arrives at age and each of the other children of the testator shall have received four thousand dollars. Then he may share equally in the remainder.

Decree of the Probate Court affirmed.

EMANUEL *vs.* BIRD, ADM'R.

1. In equity, partnership debts are considered joint and several, and the joint creditors have the right to proceed against the estate of a deceased partner, if the surviving parties are insolvent and there is no joint fund to which they may resort.
2. In the administration of partnership assets partnership debts are entitled to priority over the individual debts of the partners.
3. In the administration of the separate estate of a deceased partner, his separate creditors are entitled to priority over the joint creditors, so long as there is a joint fund to which the latter may resort.
4. When the surviving partners are insolvent and there is no joint fund to which the partnership creditors may resort, they are entitled to share in the assets of the deceased partner *pari passu*, with his separate creditors.

5. Whether a partnership creditor can participate in the administration of an insolvent estate, when the surviving partners are solvent. QUERE?

ERROR to the Court of Probate of Mobile.

THE plaintiff in error filed a claim against the estate of Tho. Casey, deceased, which had been declared insolvent. The claim was a partnership debt against the firm of Greene, Casey & James, of which Thomas Casey was proved to be a member. It was also proved that Greene and James, the other partners, were insolvent. The Court of Probate decreed "that said claim be allowed in the event that the assets of said estate shall be deemed sufficient to pay in full the individual liabilities of said decedent, and not otherwise."

GIBBONS, for plaintiff in error:

1. A debt due from a partnership is the several debt of each co-partner, and each may be separately sued.—Clay's Dig. 323, § 63; 1 Ala. 235; 5 ib. 216.

The natural inference from this is specifically asserted, (Clay's Dig. 325, § 67,) on condition certain affidavits are filed with the court, which has been done in this case.

It is true that inasmuch as the assets go to the survivor, at common law, the survivor must be first sued; but the last recited act has altered that rule even at law in this State, where the survivor is shown to be insolvent.

At equity full effect is given to the notion of debts due by a partnership being joint and several, and the creditor is permitted at once to proceed against the estate of the deceased partner.—Story on Partnership, 515; Collyer on Part., 404-5, § 4. The rule is so at common law because the remedy survives. Here by statute the remedy is against either survivor, or the estate. The law then is different; "the reason ceasing, the law ceases." It is admitted that natural justice demands that co-partnership creditors should first resort to the partnership funds for their payment, but where there are no partnership funds, there is no reason in thus postponing the creditor of the partnership to the individual creditors, for he holds a separate claim against the individual partner as well as they.—See Story on Partnership, 517, *et seq.*

In this case there is no distinct partnership fund. All the assets of the co-partnership were received by Casey, and he assumed to pay the debts of the concern. He has thus made this an individual debt of his own, and it should be so treated.—See Story, 520 *et seq.*

The act of 1843, under which this estate is to be settled, has the same object as the bankrupt laws of England, that is, a ratable distribution of the property among the creditors. There is no solvent living partner, and no joint funds. In such case a partnership creditor can come in against the estate *pari passu* with the separate creditors. This is stated by Judge Story to be the rule practiced upon by the court in England administering the bankrupt law.—Story on Partnership, 517, bot. page, and cases there cited.

And where the transaction shows it to have been the intention of the parties to make it a joint and several demand, the partnership creditor has been permitted to claim of the individual partner, as if it were simply an individual debt.—3 Ves. jr. 573; 1 Atkyns R. 106; 5 Serg. & R. 90, opinion of Gibson, J.

Then under the several statutes of this State in relation to copartners, and the statute governing the distribution of insolvent estates, (Clay's Dig. 192, § 2,) it is contended that Emanuel's claim makes him such a creditor of Casey as to entitle him to a ratable distribution of the assets in the hands of the administrator.—7 Sm. & Marsh. 280; 1 Ash. R. 347; 6 Ohio 103, 113; 8 ib. 328; 22 Pick. 450; 5 Cranch 40.

Wm. G. Jones, *contra:*

1. The main point presented by the record in this case is new in this court, and it is one of very great importance in the settlement of insolvent estates in Alabama. Where a partner in a firm dies, leaving surviving partners, and there are individual creditors of the decedent, and also creditors of the partnership, and the estate of the decedent is insolvent, shall the individual creditors and the partnership creditors share equally and *pari passu* the individual estate of the decedent, or shall the individual creditors be first paid out of the individual assets? This is the main question in the case. It is well settled, that on the death of a partner, the surviving partners are entitled to all the assets of the firm, for the purpose of collecting and disposing of

them for the payment of the debts of the firm. Hence it is, that at law the creditors of the firm can only sue the surviving partners. Hence, also, partnership debts and obligations were considered as joint only, and not joint and several. The creditors were creditors of the surviving partners only; they were not creditors of the decedent or of his estate. As to the deceased, the debt was extinguished at his death. It is not necessary to cite authorities for principles so well settled. There is another principle of the law of partnership so well settled as not to be contested. It is, that partnership creditors have a right to full payment of their debts out of the partnership assets, before any individual creditor of either partner can subject them to his debt. This principle has never, so far as I can find, been departed from, and has always been applied in cases of bankruptcy and insolvency. The converse of this is equally true, that in cases of insolvency the individual creditors of an insolvent partner are entitled to priority of payment out of his individual estate over the partnership creditors. This is a principle of general equity and does not rest on any statutory provisions of the bankrupt or insolvent laws, either of England or this country. It has been fully recognized and acted on by the courts and jurists of the highest authority, both in this country and in England.—Coll. on Part., Perkins' edit., 526-37; Ib. 637; Cary on Part. 296, (5 Law Lib.;) Gray v. Chiswell, 9 Ves. jr. 118; 3 Kent's Com. 64-5; Story on Part. 516, § 363; Ib. 519, § 365; McCullough v. Dashiell, 1 Har. & Gill, 96; Arnold & Pinckard v. Hamer, 1 Freeman's Ch. 509; Oakey & Co. v. Rabb's Ex'rs, 1 ib. 546.

According then to long and well settled principles, the decision of the Judge of Probate, giving a priority of payment to Casey's individual creditors out of his individual estate, was correct. But it is contended by the counsel for the plaintiff in error, that the supposed insolvency of the surviving partners of Casey will prevent the application of the principle above stated, to this case. To this, there are two conclusive answers; first, there was no legal proof of the supposed insolvency of Green & James in the Probate Court. The only things touching that subject are the *ex parte* affidavits of the claimant himself and of King, which it is obvious were not evidence and could not be regarded by the court. Secondly, the insolvency of the survivors may have been considered in equity as a ground on which the

creditors of a copartnership may come into equity to subject the estate of the deceased partner to their demands, before exhausting legal remedies against the surviving partners. But it has never, in any case of insolvency, been held to vary the rule that the partnership creditors are entitled to priority of payment out of the partnership property, and the individual creditors to priority of payment out of the individual property.

It is also urged for the plaintiff in error, that our statutes in relation to partnership liabilities and insolvent estates abolish in this State the principle we contend for. This is not the proper construction or effect of our statutes. The statute of 1818, (Clay's Dig. 323,) only regulates the practice and mode of procedure on partnership debts; it does not alter their character nor make them joint and several, instead of joint. This is the construction put on this statute by this court, in the cases of Marr's Ex'x, v. Southwick, 2 Port. 371, and Trann v. Gorman & Chapman, 9 ib. 456; see also, Lucas v. Atwood, 2 Stew. 384. In this respect our statute is essentially different from the Mississippi statute, on which alone the case, Dahlgern v. Duncan, 7 Smedes & M. 295, so much relied on for the plaintiff in error, was decided. But even the Mississippi statute was held by Chancellor Buckner, 1 Freem. R. 509-546, and by Chief Justice Sharkey, in his dissenting opinion in the case of Dahlgern v. Duncan, 7 Smedes & M. 295, not to be properly construed, as contended for by the counsel for the plaintiff in error. The statute of 1818 then, can have no such effect as that contended for by the counsel for the plaintiff in error, unless the decisions of this court above cited are overruled.

The statute in relation to insolvent estates, (Clay's Dig. 192,) was intended to do away with the distinction which previously existed between judgment debts, specialty debts, and simple contract debts. It puts the creditors of the insolvent estate, whether by judgment, specialty or simple contract, on an equal footing as between themselves. It obviously was not intended, and ought not to be construed, to bring in a new class of creditors, to make those who were only creditors of the surviving partners, and not of the decedent, creditors of the insolvent estate.—See the cases cited from Freeman's Rep., above. This statute then does not aid the plaintiff's claim; neither can the statute of 1839, (Clay's Dig. 324,) aid the plaintiff. That ap-

plies only to actions at law, and applies only to solvent estates, for at the time that act was passed no action at law could be maintained against the administrator of an insolvent estate. Besides, that act requires an affidavit of the insolvency of the surviving partners, at or before the commencement of the proceedings against the administrator of the deceased partner. No such affidavit was made in this case until long after this claim was filed and contested; and if suit were brought without such previous affidavit, no execution could issue until after there had been judgment, execution, and a return of *nulla bona* against the surviving partners. But at most this statute could have no influence on the rule as to the prior right of the individual creditors to payment out of the individual estate, in case of insolvency. It could have no greater effect than was given to it by the probate judge in this case. The injustice, inconvenience and hardship of the rule contended for by the plaintiff in error, must be apparent to the court on reflection, and should prevent the court from adopting it, at the sacrifice of such equitable and well established principles as would be overthrown by its adoption. If this be established as law, then a man who is a partner in a firm may die leaving individual property more than sufficient to pay all his individual debts, and partnership property more than sufficient to pay all the partnership debts. The partnership property goes to the surviving partner. The partnership creditors may nevertheless file their claims against the estate of the deceased, and thereby render it insolvent, and get their *pro rata* share of the individual estate, to the prejudice of the individual creditors, and then make all the balance of their claims out of the surviving partners, or the partnership effects.

DARGAN, C. J.—At common law when a partnership was dissolved by the death of one of its members, the creditors of the firm had no remedy against the representatives of the deceased partner, but were compelled to look to the survivors alone for the payment of their debts; and it seems that at one period the same rule prevailed in equity, and that the joint creditors, neither at law nor in equity, had any remedy against the separate estate of the deceased partner.—Story on Part., § 362. But it is now the well settled doctrine, that in equity all partnership debts are to be considered joint and several, and thus

considered, the joint creditors have the right to proceed in equity against the estate of the deceased partner, if the survivors are insolvent.—Story on Part., § 362; Coll. on Part., § 580, Note. Indeed, it is said, in many cases, and by writers of high authority, that the joint creditors may proceed immediately against the estate of the deceased partner, whether the surviving partners are solvent or insolvent.—Story on Part. 362; Coll. § 580. But it is not necessary for us to decide in this case, that the joint creditors may proceed against the estate of the deceased partner, if the survivors are entirely solvent, and I therefore decline to express any opinion upon it; for it will be seen upon a close investigation of this question, that it is surrounded with much difficulty and embarrassment. But where the surviving partners are insolvent, and there is no joint fund against which the joint creditors can proceed, all difficulty is removed, and the partnership debt being considered in equity as joint and several, the creditor may at once proceed against the estate of the deceased partner. Having the right thus to proceed against the representative of the deceased partner, the question arises, how shall the assets be distributed between a joint creditor and an individual creditor of the deceased, when there is not enough to pay both? The principle is unquestionably settled, that in the administration of the copartnership assets, the partnership debts are to be preferred; and are entitled to priority over the individual debts of the partners. On account of this preference of partnership debts over individual debts, in the administration of the partnership assets, necessarily, in my opinion, results the rule, that the separate creditors are to have priority over the joint creditors, in the administration of the separate estate, so long as there is a joint fund to which the joint creditors may resort for payment; for if we were to allow the joint creditors to come in and take *pari passu* with the separate creditors, the fund may be exhausted, leaving the separate creditors unpaid, when all the debts could be paid in full by compelling the joint creditor first to exhaust his remedy against the joint estate, which is primarily liable to pay the partnership debts. The general doctrine, however, whether founded on this reasoning or not, is this, that the joint creditors have a priority of right to payment out of the joint estate, and the separate creditors have the like right of priority out of the separate estate.—Story on

Part., § 363. But when there is no joint estate, and the surviving partners are insolvent, then there can be no reason why the separate creditors should be entitled to priority over creditors of the firm; for the debt, though joint at law, is considered joint and several in equity; it is therefore a debt that the *deceased partner separately, as well as jointly*, owed, and the only ground on which such a debt could be postponed must be, that there was another fund bound for its payment. But when this ground is removed and there is no other fund that can be reached by the joint creditors, there can be no reason in allowing separate creditors priority over them. It appears to be the well settled doctrine, that in cases of bankruptcy, where there is no joint estate and no solvent partner, the joint creditors may prove their debts against the bankrupt's estate and receive payment *pari passu* with his individual creditors.—Story on Part., § 363; 14 Ves. 447; *Ex parte* Janson, 3 Maddox, 229; 15 Ves. 52. There can (in my opinion) be no other ground on which the joint creditors can be allowed to prove their demands against the estate of a bankrupt and to receive payment *pari passu* with the separate creditors, than this, that in equity the joint demand must be considered as the separate, as well as the joint debt of the bankrupt, and there being no other fund out of which it can be paid, justice requires it should be paid *pro rata* with all the other debts of the bankrupt. This reasoning applies with equal force under our statutes regulating the distribution of insolvent estates, for by them all debts are placed on an equal footing, and all are entitled to payment *pro rata*. Whenever, therefore, it is ascertained that the claim constitutes a debt that could be enforced against the estate, if solvent, it must be paid *pro rata*, if insolvent, unless there is a fund to which the particular creditor could resort for its payment, but to which the general or individual creditors could not.

Applying these general rules to the case before us, and independent of our statutes that make all partnership debts at law several, as well as joint, we think the Orphans' Court erred; for the testimony shows that the surviving partners, Green & James, are insolvent, and that there is no partnership fund to which the plaintiff can resort.

It may not be improper to say, that we have decided this case upon its own facts, and upon the general principles to which we

have adverted, without intending to decide whether a partnership creditor could be permitted to participate in the administration of an insolvent's estate and receive his *pro rata* dividend, if the surviving partner was solvent and fully able to pay.

Let the decree be reversed and the cause remanded.

JONES *vs.* BUCKLEY.

1. On an appeal from a judgment rendered by a justice of the peace, a statement of the cause of action which does not set forth the amount sued for is defective.
2. When the plaintiff sues for the work and labor of her minor son, she must aver in the statement of her cause of action, that the father of the minor is dead, or that she is entitled to the minor's services, as guardian or otherwise.

ERROR to the City Court of Mobile. Tried before the Hon. Alexander McKinstry.

C. W. RAPIER, for plaintiff in error:

In cases of appeal from justices' courts, if the amount in controversy be over twenty dollars, there must be a statement of the cause of action, and though such statement is not required to be in conformity with technical rules of pleading, yet it should set forth a substantial cause of action, and contain the material facts of a declaration.—4 Por. 509; 1 Ala. 297; 1 Stew. 266.

No amount is mentioned in the statement in this case, but the amount in controversy is ascertained by the recovery.—Cothran v. Weir, 3 Ala. 24.

The statement is defective because it shows not the amount sought to be recovered. But particularly and fatally is it defective, because it shows no right in the plaintiff, who is represented as the mother of the minor, to maintain the action.

In an action by a mother for the services of her minor son, it must be averred in the declaration that the father is not living, and that she is entitled to the services of the minor as guardian

or otherwise.—Burk v. Phips, 1 Root, 487; Jones v. Tevis, 4 Littell 25; 15 Mass. 274; 18 Wend. 637.

COLEMAN, J.—The plaintiff in the court below recovered a verdict and judgment for fifty-three dollars, upon an appeal from a justice of the peace. The defendant demurred to the plaintiff's statement or declaration, which is in these words:

"ANN BUCKLEY, v. FRANCIS JONES, } Plaintiff claims from defendant for the work and labor, care and diligence of her minor son, Peter."

Although this court has said that it will not scrutinize proceedings of this sort by the technical rules of pleading, yet it has uniformly held that the plaintiff's statement must set forth a substantial cause of action. The foregoing statement is defective in substance, first, in not setting forth the amount claimed or sued for; secondly, in not averring that the father of the minor is not living, or that the plaintiff is entitled to the services of the minor as guardian or otherwise.

The court erred in overruling the demurrer, and therefore the judgment is reversed and the cause remanded.

EWING *vs.* SANFORD.

1. In an action on the case for a malicious prosecution, the judgment of the justice ordering the commitment of the plaintiff is evidence, and in the absence of countervailing proof, sufficient evidence of the existence of probable cause, but the plaintiff is not thereby concluded from introducing proof to show that the prosecution was without probable cause and malicious.
2. An affidavit made for the purpose of procuring the arrest of the party accused, which charges that "the said S. has feloniously taken, stolen and carried away from the possession of C., where she was placed by affiant, a negro woman named Eliza, valued at $450, and that she is now in the possession of the said S." is sufficiently descriptive of an offence against the criminal laws of the country to justify the magistrate in causing the party accused to be apprehended and brought before him.

3. An action on the case for a malicious prosecution may be maintained, although the warrant for the party's arrest does not describe the offence with which he was charged, and the affidavit, warrant for commitment and recognizance misdescribe it.
4. When the facts are ascertained and undisputed, the question whether they constituted probable cause is a pure question of law, which it would be erroneous for the court to refer to the jury; but where the facts are to be ascertained by the jury from evidence which is doubtful or conflicting, probable cause becomes a question for the jury.
5. If the charge given by the court is legally correct, although the jury, from the general terms in which it is expressed, may be misled in applying it to the particular facts, yet an objection to it cannot be sustained. The party objecting should ask a more specific charge.
6. The owner of personal property being entitled to the present possession of it, when he has been deprived of it, has a right to re-take it whenever he can obtain the possession without a breach of the peace, whether he believes his title *bona fide* or otherwise.
7. A charge is erroneous which asserts, that if the facts establish a want of probable cause malice is a necessary implication *independent of the circumstances in proof.*

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

This was an action on the case by Sanford v. Ewing, to recover damages for a malicious prosecution. The affidavit made by Ewing to procure Sanford's arrest is sufficiently described in the opinion of the court. Sanford was committed by the magistrate, and was afterwards discharged on *habeas corpus* by Judge Bragg. It appears from the bill of exceptions that the negro mentioned in the affidavit was bought by Ewing at sheriff's sale under an execution against Thaddeus Sanford, and placed in the possession of one Carmelick. James Sanford, the plaintiff, claimed said negro under a bill of sale from said Thad. Sanford, and gave notice at the time of sale that the negro was his and that he would take her whenever he could do so. The exceptions and charges will be easily understood from the opinion.

Hopkins, for plaintiff in error:

1. There is no statement in the affidavit that Eliza was a slave, or the property of Ewing, or any other person, known or unknown. Larceny can be committed only of the personal goods

of some person. The affidavit therefore makes no charge of larceny.—2 Chitty's Black. Com., 179, 186. As negroes may be either slaves or free, there could be no charge of larceny made for taking a negro, if the law made slaves the subject of larceny, unless the charge included a statement also that some person had property in the slave.—Ib. 189-90. To steal and carry away a slave is not either grand or petit larceny.—Clay's Dig. 425, § 57-8. There is no such offence known to the common law as stealing a slave.—Murray v. State, 18 Ala. 727. An indictment for taking and carrying away a slave, as for a larceny at common law, does not lie in this State.—15 Ala. 259; 17 ib. 188; 18 ib. 727.

The affidavit of Ewing did not charge that the negro taken by Sanford was a slave, in the language of the statute which makes slave-stealing an offence, and therefore no offence was charged against him.—4 Por. 410; 7 ib. 101. The statement that she was worth $450, is not equivalent to a charge that she was a slave. Those who commit an offence created by statute can only be proceeded against according to the statute, and the offence must be charged in the language of the statute.—18 Ala. 727; 4 Por. 410. The lawless intention required by the statute should also have been charged in the affidavit, to make it a charge of a crime against Sanford.—8 Ala. 333, and authorities last cited; 53 Law Library, Cook's Law of Defamation, top page, 22.

2. The warrant for Sanford's arrest did not charge that he had committed any offence. His subsequent commitment by the justice for grand larceny created no liability against Ewing. Ewing is no more responsible for the erroneous judgment, than he would have been if the justice had committed S. for robbery and murder. If an affidavit states facts which do not constitute an offence, and the justice supposing that they do, should issue his warrant and commit the party for an offence, the affiant would not be liable for the prosecution.—3 Espinasse R. 165; 1 Stew. 494.

3. The declaration contains no cause of action, first, because it sets out the affidavit which charges no offence, (see authorities last cited,) and second, because it shows that the justice committed Sanford.—1 Wilson R. 232; Bull. N. P. 14; 15 Mass. 243.

4. The first charge of the court is erroneous, because it assumes that the proceeding of the justice was proper and author-

ized by the affidavit, and that Ewing is responsible for the warrant and commitment, although his affidavit charged no offence which authorized the justice to proceed against Sanford. An action for malicious prosecution can only arise out of proceedings which were authorized by law if the charge on which they were founded had been true. In a criminal proceeding authorized by law, the accused would be punishable for resisting arrest, for escaping from custody, or for breaking prison; but he may do any or all of these acts with impunity, if the charge or proceeding against him be for something which is no offence.—1 Chitty's Prac. 48. For imprisonment under illegal process, when the charge or proceeding against the accused is for an act unknown to the law as an offence, his remedy is an action of trespass.—Chitty's Prac. 49-50; ib. 636-7; Duckworth v. Johnson, 7 Ala. 578.

5. The court erred in charging that Sanford had the right of re-capture. Ewing was not the plaintiff in the execution under which the negro was sold, and was therefore no party to the injury done to Sanford, if any there was, by the seizure and sale. The re-capture by Sanford was an injury both to Ewing and Carmelick.—1 Chitty's Prac. 639-41. The negro at the time of the levy, and before it, was in the possession of Thad. Sanford, and after the sale and purchase by Ewing, the possession was transferred to him from the custody of the law and by its authority. Ewing's possession ought to be protected by law against the claims of third persons until they have been adjudicated. If Sanford had any claim he should have proceeded to enforce it in the manner prescribed by statute, which he refused to do, although requested by the sheriff. A purchaser of land at a sheriff's sale is driven to his action of ejectment, or trespass to try titles, to recover the possession from any person having it, even from the defendant in execution himself.—2 Por. 480; 6 Ala. 222. It would seem to follow that the purchaser of any kind of property at sheriff's sale, the possession having been delivered to him by the sheriff, ought to be protected against re-caption by a third person.

6. Probable cause is a question of law, and the court erred in leaving it to the jury to decide.—2 Chit. Black. Com. 99, note 14; 1 Term R. 309; 1 Wilson R. 232; Bull. N. P. 14. The question of probable cause should have been submitted to

the jury upon Ewing's belief of the guilt or innocence of Sanford.—11 Ala. 921. The court should have charged the jury that probable cause must be inferred from the commitment of Sanford by the justice, unless the plaintiff proved express malice.—1 Wilson R. 232; Bull. N. P. 14; 4 Munf. 469.

CAMPBELL, *contra.*

CHILTON, J.—The first objection taken by the plaintiff in error is, that the declaration contains no legal cause of action, first, because it shows that the justice committed the plaintiff below, thereby adjudging that there was probable ground for the prosecution, and *express* malice is not averred. To this point Reynolds v. Kennedy, (1 Wils. 232) is cited by the counsel for the plaintiff in error. In that case the defendant had exhibited an information against the plaintiff before the sub-commissioners of excise, alleging a violation of the revenue laws, in consequence of which certain goods in the plaintiff's vessel had been seized and condemned by the sub-commissioners, but their judgment of condemnation was reversed by the commissioners of appeal. Lee, C. J. said, "I shall first premise that although an action will lie against one for proceeding *wrongfully* in an *inferior court* in many cases, yet it is a kind of action not to be favored; and whenever such action is brought, the *express malice* and grievance must be laid in the declaration *and proved*, and it is not enough to say that the defendant brought an action against the plaintiff, *ex malitia et sine causa, per quod* he put the plaintiff to great charges." He further proceeds to say in speaking of the declaration, "the plaintiff having laid in his declaration that the commissioners condemned the goods, shows a foundation for the defendant's prosecution before them, so that this part of the declaration is plainly *felo de se.*" This decision seems to be supported by some of the older English cases. But we have examined the numerous cases touching this point with much care, and we have been unable to arrive at the conclusion that when the declaration charges, as this does, that the prosecution was without probable or reasonable cause, and wrongful and malicious, the fact that the magistrate committed the plaintiff, unless he gave bail to appear at court, should destroy the right of action. In many cases, this commitment is predicated alone upon

the information of the prosecutor, which information the declaration charges to be malicious and unfounded. To hold that the action of the magistrate, which the prosecutor thus superinduces by his malicious and false charge, should protect him against liability to the injured party, would be to allow him to take advantage of his own wrong. The correct rule upon this subject seems to be, that the judgment of the justice ordering the commitment is evidence, and in the absence of countervailing proof, sufficient evidence of the existence of probable cause, but it is not conclusive.—1 T. R. 505; ib. 545; 4 Wend. 591. The plaintiff is not thereby concluded from introducing proof to show that the prosecution was without probable cause and malicious.

But it is urged that the affidavit made by Ewing before the justice does not set forth a criminal charge, and that consequently the justice had no authority to issue any warrant as predicated upon it. We confess we have had some difficulty on this point, and have looked into the cases in vain for a satisfactory solution of it. There are, however, some decisions of this court, which, though not directly in point, are, in the application of the principle settled by them, persuasive to show that the court below properly regarded the affidavit as sufficient to authorize the justice in issuing his warrant for the arrest of the defendant in error.

In Bennett v. Black, (1 Stew. 39,) the warrant was "to answer a charge of robbery, by *forcibly* taking one negro from and out of the possession of one Bennett." The affidavit on which the warrant issued stated that the parties prosecuted "violently and with force and arms seized upon and took from his possession and against his will, a negro slave, his property, &c." The court, upon the trial for malicious prosecution, was called upon to instruct the jury that the warrant did not contain a charge of felony, or any crime which would authorize the action for malicious prosecution, which charge was refused, and this court sustained the judgment of the court below on that point. It was proved in that case as in this, that the prosecutor was apprised of the character of the warrant.

In Randall v. Henry, (5 Stew. & Por. 367,) it was said to be not material that the information to the magistrate or the warrant thereon should be in the form of technical accuracy. Were the law otherwise, the prosecutor could in most cases avoid this action by omitting, *ex industria*, some averment which is required

in the technical description of the offence. In the case last cited, it is said with regard to the party who obtains the issue of irregular process, "there seems to be no reason why the person prejudiced should not be at liberty to support an action on the *case* against him, where there was no cause of action, and the proceeding was *malicious*, *as well as irregular*, for it would be allowing him to take advantage of his own wrong to suffer him to turn the plaintiff round on such objection, after he had in an action on the case proved the malicious and unfounded conduct of the defendant; and it is also declared that where a party maliciously procured a magistrate to issue an illegal warrant he was held liable in an action on the case;" citing 1 Chitty's Pl. 169; 2 Chitty's R. 304.

It is certainly true, that the prosecutor is not to be held responsible for the mistake of the justice in misdescribing the offence in the process which he issues.—Bennett v. Black, 1 Stew. 494. In the case before us the affidavit is certainly very informal. It does not state that the negro Eliza is a slave, or that she was the property of any one; nor does it aver any intent on the part of the defendant to convert her to his own use or to the use of any other person, or to enable her to reach some other state or country where she may enjoy her freedom, so as to bring the offence technically within the purview of the statutory offence of slave stealing.—Clay's Dig. 419, § 18; Williams v. The State, 15 Ala. 259, and case cited; Ham v. The State, 17 Ala. 188; The State v. Weaver et al. 18 ib. 293. But it does state that Sanford had *feloniously* taken, stolen and carried away a *negro woman* of *value*, &c., from the possession of Carmelick, where the prosecutor had placed her, &c. We think this is sufficiently descriptive of an offence against the criminal laws of the country to justify the magistrate in causing the party accused to be apprehended and brought before him. The information imputes the crime of felony in an informal manner—that Sanford *feloniously* took, that is, with a wicked heart and a fixed purpose to commit a crime, a negro woman, *prima facie*, a slave, of a certain value, from the *possession* of Carmelick, and that she is now in the *possession* of the party accused, &c. Such a description does not sufficiently set out the constituents of the statutory offence to make a good indictment, but it has been held that an action of this character may be maintained

against a party for the malicious prosecution of a bad indictment; (6 Maule & Selw. 29,) and although the warrant for the party's arrest does not describe the offence, and the warrant for the commitment and recognizance for his appearance for further examination misdescribe it, yet these are inaccuracies which the law, from the necessity of the case, regards with indulgence. Hence the statute provides, that no person imprisoned for any criminal or supposed criminal offence, shall be discharged for any irregularity in the process, order or warrant of commitment, but the court or magistrate granting a *habeas corpus*, or before whom such warrant may be returned, shall inquire into the facts, &c., and admit to bail, or remand the prisoner, as the law and justice may require.—Clay's Dig. 469, § 40; State v. Weaver, 18 Ala. 293, 299. Upon the whole, we come to the conclusion, but, we confess, not without hesitation, that this proceeding, based upon the information of Ewing, if prosecuted maliciously and without any reasonable or probable ground therefor, will sustain this action.

Let us next turn to the charges. The circuit judge instructed the jury that they should determine, as reasonable men, from the evidence, whether there was or was not probable cause for the prosecution. It is objected to this charge, that the question as to what amounts to probable cause, being a question of law, should have been decided by the court, instead of being submitted to the jury. Were the facts ascertained and undisputed, the question whether they constituted probable cause would be a pure question of law, and in such case it would be erroneous for the court to refer such question to the jury. But where facts are to be ascertained by the jury from the evidence, which is doubtful or conflicting, the most that the court can do is to charge the jury hypothetically as to what would or would not constitute reasonable or probable cause for the prosecution; and in such case, probable cause becomes a question for the jury. So that, in the language of Lord C. J. Denman, in the case of James v. Phelps, (11 Ad. & Ellis, 508,) "the question whether there be or be not probable cause, may be for the jury or not, according to the circumstances of the particular case."—See also Blackford v. Dod, 2 B. & Ad. 179, (S. C., 22 Eng. C. L. 53;) McDonald v. Rooke, 2 New Cas. 217, (S. C., 29 Eng. C. L. 312.) We think the case before us presents a state of facts which war-

ranted the judge in submitting the question to the jury, it being a mixed question of law and fact.

But the counsel for the plaintiff in error contends, that if the court below was justified in thus submitting the question as to whether there was reasonable or probable cause for the prosecution, to the jury, they should have been told that if Ewing honestly believed there was probable ground for instituting the prosecution, although none such existed in fact, they should find for him. In respect to this latter proposition, we endeavored in a recent case (Long v. Rodgers, at the present term,) to lay down the rule in explicit terms, and need not here repeat what we there said. It is a sufficient response to the objection here taken, that the charge of the court upon this point was correct, as far as the judge went; and not being bound to go farther and give other charges, unless specially requested, there is no error in his omission to present this feature in the defence, since he was not requested to do so. The rule, as established by numerous decisions of this court, is, that if the charge be legally correct, although the jury from the general terms in which the court states the law may be misled in applying it to the particular facts, yet an objection to it cannot be sustained. The party objecting to it should ask a more specific charge.—Hodges v. The Br. Bank, 13 Ala. 455; The State v. Brinyea, 5 ib. 242; 14 ib. 151; 9 ib. 452; 16 ib. 63; 9 ib. 63; 1 S. & P. 181.

The charge of the court with regard to the right of recaption, was perhaps too favorable for the plaintiff in error. The charge asked for assumed that if the sheriff sold property under an execution which was not subject to such sale, yet it converted the right of the true owner into a chose in action, which ought to be enforced by action at law. This charge was given, but with the explanation that "the party under such circumstances," that is, the true owner whose property has thus wrongfully been sold by the sheriff, would not only have a right of action, but it was competent for him, *if he believed* he had a *bona fide* title to the property, to take possession of it peaceably, if he could do so. Now it is very clear that if the true owner, being entitled to the present possession of his property, can obtain possession of it without a breach of the peace, he may do so, and this whether he believes his title *bona fide* or otherwise. So that superadding the belief of the plaintiff below, as to the *bona fides* of his title, to

the title itself, as a condition upon which his right to re-capture his slave depended, was prejudicial to the plaintiff below, and not to Ewing, the defendant.

The latter portion of the charge must be construed with reference to that which it explains, and thus considered, we have no hesitation in saying that it was fully as favorable to the defendant as the law would warrant.

The court below also instructed the jury, that "malice, as in all such cases, must be determined by the circumstances. *Independent of these*, however, if the jury should be satisfied from the evidence that there was a want of probable cause, the law would imply the existence of malice." This charge was duly excepted to by the defendant below, and constitutes the only remaining subject of inquiry. If we rightly comprehend this charge, it is manifestly erroneous, and was well calculated to mislead the jury. The question as to the existence of probable cause, arising upon the evidence spread out in this record, we have said, was properly submitted to the jury, though it is frequently a question solely for the decision of the judge. The question whether the prosecutor acted maliciously, is always one of fact, which the judge has no power legally to withdraw from the jury. This charge does in effect forestall the inquiry of the jury upon the subject of the existence of malice. True, it asserts that "malice must be determined by the circumstances." But then they are told that, *independent* of the circumstances, that is, as we understand it, laying the circumstances out of view, still if the jury believed there was a want of probable cause, their duty as to any farther inquiry upon the subject of malice would cease, since the law in such case implied the malice. The want of probable cause is evidence of malice, and in the absence of exculpatory proof, is sufficient evidence, and the legal presumption of malice becomes conclusive. Hence the numerous cases which hold that malice may be inferred from the want of probable cause; for if a man prosecute another for a criminal offence, without any ground sufficient to create in the mind of a reasonably cautious and prudent man a belief of his guilt, the law attributes his conduct to a wicked and depraved heart, and justifies the jury in "presuming," or "inferring," (as the phrase usually is,) that he is actuated by malice; indeed, requires them to do so.—Long v. Rodgers, *supra*.

In Mitchell v. Jenkins, 5 B. & A. 588, (S. C., 27 Eng. C. L. 151,) the question as to the existence of malice was withdrawn from the jury by the judge on the trial at the assizes, by instructions not essentially different from the charge under consideration. The court in that case determined that there was a want of probable cause, and told the jury that there were two kinds of malice—malice in law, and in fact, and that the defendant having wrongfully caused the arrest, it resulted that there was malice in law, and the question for them was narrowed down to an inquiry of damages. Upon error to the King's Bench, Parke, J., said, "he had always understood, since the case of Johnson v. Sutton, (1 T. R. 510,) that no point of law was more clearly settled, than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, namely, that the prosecution or arrest was malicious and without reasonable or probable cause; * * that when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration." He then proceeds to enumerate instances where there may exist a want of probable ground for the prosecution, and yet no malice; as if the party caused the arrest, acting under a wrong notion of the law and pursuant to legal advice; or if he entertain a *bona fide* belief that the cause for the arrest existed. Denman, C. J., and Patteson, J., were of the same opinion, and Taunton, J., who presided at the trial below, acknowledged his error, and also coincided with the other judges in their opinion. Professor Greenleaf thinks the opinion just quoted of Justice Parke, a clear illustration of the law of malice.—2 Greenl. Ev. (2d edit.) 431, N. 1.

The effect of the charge was to authorize the jury, if they found there was a want of probable cause, to shut out from their consideration the circumstances which tended to show (however weak they may have been) that the prosecutor was actuated by an honest belief that the plaintiff was guilty of the offence charged against him. Whether Ewing took the proper steps and used the necessary precaution to inform himself, so as to avoid the inference of malice which might arise from temerity or a reckless disregard of the rights of the plaintiff; or whether, having taken such steps, he entertained an honest belief of his guilt, are questions of fact upon which we are not allowed to express an opin-

ion. These are inquiries for the jury, from a survey of all the proof. It is sufficient for the purpose of this trial, that there was some evidence directed to those points, and that an entire absence of malice may consist with a want of probable cause, as was decided in Chandler v. McPherson, 11 Ala. 916, and which we have subsequently affirmed in Long v. Rodgers, *supra*. It results then that the charge, which asserts that if the facts make out a want of probable cause, malice is a necessary implication *independent of the circumstances in proof*, is erroneous.

Let the judgment be reversed and the cause remanded.

COLLINS *et al.* *vs.* RUDOLPH.

1. An acknowledgment in writing by a married woman that an account for medical services, which is made out against her individually, is just and correct, is tantamount to an express promise in writing to pay, and creates a charge upon her separate estate.

ERROR to the Chancery Court of Lowndes. Tried before the Hon. J. W. Lesesne.

JUDGE, for plaintiffs in error.

STONE, *contra*.

DARGAN, C. J.—The only difference between this case and the case of Lovenbury & Co. v. Collins, decided at the present term, consists in this, in that case the bill sought to subject the separate estate of Mrs. Collins to the payment of a promissory note; whilst in this, the complainant's demand consists of a medical account made out against Mrs. Collins, which she under her hand acknowledged to be just and correct. In this State, we have followed the English rule, that a married woman is to be considered as a *feme sole* as respects her separate estate, and may dispose of it as she pleases, unless the instrument through which she claims imposes limitations or restrictions upon her power of disposition.—Bradford v. Greenway et al., 17 Ala.

797; Forrest v. Robinson, 4 Por. 44. It would seem to me to follow as a necessary consequence from this rule, that all the debts of a married woman should create a charge upon her separate estate, as well those where the promise to pay is implied by law, as those evinced by bond, note, or bill of exchange; and this seems to be the tendency of the modern English doctrine.—Owen v. Dickinson, 1 Craig & Phillips, 48, and also Prater's Law of Hus. & Wife, 109.

It is not, however, necessary to decide in this case, that the contracts of the wife where the promise to pay is to be implied by law, would create a charge on her separate property, for we consider the acknowledgment by Mrs. Collins under her signature, that the account was just and correct, tantamount to an express premise in writing to pay, and consequently as creating a proper charge upon her separate estate. In the case of Murray v. Barlee, 3 My. & Keene, 209, a solicitor was employed by a married woman to attend to various transactions, and she by letter promised to pay, but made no reference to her separate estate, yet it was held that her separate estate was liable to pay the bill. Now, in the case before us, the account was made out against Mrs. Collins, thus: "Mrs. Louisa Collins Dr. to B. B. Rudolph, for medical services during the year 1845"—then stating the amount. At the foot of this account Mrs. Collins writes, "this account is just and correct," and subscribes her name. She therefore acknowledged her indebtedness, and of course her liability to pay, so far as a married woman can create a liability, and as she only has capacity to bind her separate estate, we must infer that she so intended, just as fully as if she had executed her promissory note for the amount. Indeed, I think no distinction can be drawn between this demand and a promissory note; that is, no good reason can be shown why the promissory note of a married woman should create a charge on her separate estate, and yet that this demand should not. We think they must stand on the same footing, and all the English authorities, as well as the decisions of our own court, show that the promissory note of a married woman will constitute a charge upon her separate estate, although no reference be made in the instrument itself to her separate property.—See Roper on Hus. & Wife, 235-38; 2 Story's Eq. 840, § 1398, and cases referred to in the Note; Clancy on Mar. Women, 340.

Let the decree be reversed and the cause remanded.

JORDAN *vs.* GRAY.

1. When two declarations are set out in the record, and the clerk certifies that the last one was filed after the adjournment of the court at which a judgment on demurrer was rendered in favor of the defendant, the appellate court can only look to the first declaration as properly a part of the record.
2. A *feme covert* cannot sue at law by her next friend.
3. When the declaration discloses that a *sole* plaintiff is a *feme covert*, a demurrer will lie to it.

ERROR to the Circuit Court of Tallapoosa. Tried before the Hon. John J. Woodward.

DETINUE for a slave by Sealy Jordan, wife of Elijah Jordan, who sues by her next friend, Charles Jordan, against Gray. A demurrer to the declaration was sustained by the court below. Two declarations are set out in the record, to the second of which the following certificate of the clerk is prefixed: "After the adjournment of the court plaintiff proposed to file the following as the amended declaration under the leave given to amend, and to which the second demurrer was sustained, it then being considered by the court filed though not actually done, but defendant objecting because it was not filed within the term, plaintiff was not allowed by the clerk to file the same as a part of the record in the case, but at his instance it is sent up with the record and certified with the above facts." The record does not otherwise show that leave was given to amend after the judgment on demurrer, and but one demurrer and judgment thereon are set out.

FALKNER and J. E. BELSER, for plaintiff in error, cited 1 Chitty's Pleadings, 387; 9 Ala. 855.

BARNES & ALLISON, *contra*, cited 1 Black. Com. 347-8; 2 Kent's Com. 154-5; Clancy on Hus. & Wife, 54; 1 Chitty's Pl. 28; Dan. Ch. Pr. 189; Story's Eq. Pl. 61-2; 14 Ala. 740.

COLEMAN, J.—Two declarations appear to have been copied in the record filed in this case. The clerk certifies that the last declaration was filed after the judgment on the demurrer in fa-

vor of the defendant, and after the adjournment of the court, consequently this court can only notice the first as properly a part of the record.

The declaration commences in these words, "Sealy Jordan, wife of Elijah Jordan, who sues by her next friend, Charles Jordan, plaintiff," &c., and then proceeds with the usual count in detinue for a negro man slave, and does not aver any legal title to, or separate property in the slave, to be in the wife.

It is agreed by all the elementary writers on the subject, that a *feme covert* cannot in any case sue alone, unless her husband be *civiliter mortuus*, &c. But if she improperly sue alone, having no legal right of action, she will be non-suited.—1 Chitty, 23; 9 Ala. 855. We think it only becomes necessary to plead the coverture in abatement, when it does not appear in the pleadings in the case, but when the fact is fully disclosed by the declaration, as in this case, the objection is good on demurrer. Again, if a non-suit will be ordered, when it is disclosed by the testimony that a plaintiff is a *feme covert* and has no legal right of action, then we think a demurrer should be sustained to a declaration disclosing the same facts.

There is no law authorizing a married woman to sue by her next friend at common law, and we think the declaration defective in that particular. Let the judgment below be affirmed.

KIDD *vs.* MONTAGUE.

1. The Act of 1848, (Pamphlet Acts, 63,) "securing to married women their separate estates," &c., does not affect the husband's right to reduce to possession his wife's choses in action, which vested in him on his marriage prior to the passage of the act.
2. A decree of the Orphans' Court, in favor of husband and wife for the wife's distributive share of an estate, cannot be amended at a subsequent term *nunc pro tunc*, in favor of husband and wife for the separate use of the wife, when the record does not disclose the name of the wife, and show that her interest in the estate accrued after the passage of the Act of 1848.

ERROR to the Court of Probate of Marengo.

ON the final settlement of the estate of Reuben Vaughan, deceased, at the June Term, 1849, of the Court of Probate of Marengo county, a decree was rendered in favor of R. V. Montague and wife, A. J. Kidd and Wife, Henry Dugger and wife, Gaskett and wife, and White and wife, for the respective distributive shares of the wife. At the September Term of the court, on motion of Montague's attorney, it was ordered, that the decree be so amended *nunc pro tunc*, that the distributive share in each case should stand decreed to husband and wife for the separate use of the wife, and the decree was amended accordingly.

HENLEY, for plaintiff in error:

I. It is clearly settled, by a long and unbroken chain of authorities, that marriage is an absolute gift to the husband of all the personal property of the wife in her possession at the time of the marriage, and also of such of her choses in action as he may reduce to his possession during the coverture.—Legg v. Legg, 8 Mass. 99-101; Howe v. Bigelow, 13 Mass. 384; Cl. on H. & W. 1-2-3-4.

A legacy to the wife vests absolutely in the husband, and he may release it either before or after it becomes payable.—Commonwealth v. Manly, 12 Pick. 173-5. So of the wife's distributive share of an estate.—Ib.; 2 Bro. C. C. 589; 1 Anstr. 63. So a share of personal estate accruing in right of the wife during coverture, vests even before distribution made absolutely in the husband, and does not, in the event of the death of the husband, survive to the wife.—Griswold v. Perriman, 3 Conn. 564; Lee v. Wheeler, 4 Ga. 541; 8 Mass. 229-30; Cary v. Taylor, 2 Ver. 302. So he has control of a legacy given to his wife generally, and may release or assign it by a deed to which his wife is not a party.—Tucker v. Gordon, 5 New H. 564. So the husband may sue in his own right after the death of his wife, for a legacy accruing to the wife during coverture.—Goddard v. Johnson 15 Pick. 352-3; 3 Rawle, 199.

II. To enable the husband to secure and enjoy the benefit of these rights, the law has placed within his reach and under his control all the requisite means.

1. He may sue for and recover her choses in action without her consent.—Clan. on H. & W. 4. Some of the authorities hold that such suit must be in the joint names of the husband and wife.—Ib. Yet it is held in some respectable authorities, that he may sue in his own name alone.—14 Pick. 353; Shuttleworth v. Noyes & Downs, 8 Mass. 229; Tucker v. Gordon, 5 New H. 564.

2. He may not only sue and recover judgment for his wife's choses in action, but may also proceed to enforce by execution or otherwise the collection of such judgments to his own use and benefit.—1 Dan. Ab. 342; 10 Mod. 160-66; 3 Salk. 63. So where a judgment has been obtained by both husband and wife, it has been held that he alone may sue out a *scire facias* for the damages and costs.—Clan. on H. & W. 4-5. So the wife's right of survivorship to her choses in action may be barred by a judgment recovered for them during the coverture, in the joint names of husband and wife.—Clan. on H. & W. 112-13; McGee v. Ford, 5 Smedes & M. 769.

2. There seems to be no limit to this right to prosecute to judgment and enforce the collection of the wife's choses in action, so far as the action of the courts of law is concerned, and whatever exceptions or limitations there may be to the right, they are found exclusively in the jurisdiction and actions of the courts of equity. At law the rights of the husband are uncontrolled. If the wife wishes to recover such choses to her sole and separate use, she must resort to a court of equity.—Clan. on H. & W. 440-1-2.

4. But it is insisted that even equity would not interpose for the benefit of the wife, except on a proper case shown. And even then equity would only require that the husband should settle a part of the property or money collected to the separate use of the wife, leaving the husband to the uncontrolled enjoyment of the remainder.

III. If the foregoing positions be correct, it seems to result as a necessary consequence, that the husband is and must be clothed with the legal title to his wife's choses in action. Without this he could not sue for and recover possession of such choses in action. It is only by being invested with such legal title as a means, that he can secure the end of possession and enjoyment of such choses.

1. It may be assumed then, that the husband's legal title vests whenever the wife's right accrues.

2. That such legal title cannot be divested by any power or authority, other than that of the husband himself, or by his consent.

IV. If the foregoing points be well taken, it results that long before the passage of the act of 1848, Kidd, the husband, was invested with the legal title to his wife's share in her father's estate; and the statute itself would be inoperative to the extent of such share, even if in express terms it embraced this case. The act could not affect the legal title to property which had become vested prior to the passage of the act; and so it has been held in a similar case in Mississippi.—McGee v. Ford, 5 Smedes & M. 769.

V. But it is contended, lastly, that the act of 1848 does not either in letter or spirit, embrace such a case as this. The act is evidently prospective. There is not a term in it that seems to refer to the past. Its language is, "When a descent, gift, demise or otherwise, shall accrue to any woman," &c., referring very evidently to the future, and not to the past.

In the case of R. Vaughan's estate, all the rights of the several distributees had accrued long before the act was passed. Kidd's right to his wife's share had become a vested right in him, and he was in the prosecution of his legal rights, by the means the law had given him, to reduce it into possession, when the act of 1848 was passed.

In neither of the cases of Fagan v. Fagan, 15 Ala. 341, and Key's Adm'r v. Vaughan, ib. 500, was the question in relation to the application of the act of 1848 raised by the counsel engaged in the case, nor did the facts of the case necessarily require the decision.

MANNING, *contra:*

1. Under the act of March 1848, "securing to married women their separate estates," &c., the decree of an Orphans' Court upon the settlement of an estate of which a married woman is distributee, should be in favor of the husband and wife, for the separate use of the wife.—Fagan's Adm'r v. Fagan's Dist., 15 Ala. 341; Key's Adm'r v. Vaughan et al., ib. 500. And if the decree be rendered differently, the error is a clerical

misprision, and may be amended accordingly.—Same cases, and Parks v. Stonum, 8 Ala. 752. Upon the marriage of a man to a woman having a right to personal property, or a chose in action, he did not become entitled to it by contract; but it went to him by operation of law, (the common law,) which did not, in respect of such things, recognize her separate existence. Her existence was merged in that of her husband; and when, therefore, the property came to her possession, it was by the law regarded as in his possession, and by operation thereof, and not by the direct contract of the parties, became his. Hence it was that courts of chancery, even before the act of 1848, exercised their powers so as to secure such choses in action to the use of the wife, which they could not have done if the husband had acquired them by contract. And now by the act referred to, the Orphans' Courts are required, in such cases as the present, to do what the courts of chancery did before this enactment.

2. Amendment of a judgment *nuc pro tunc*, may in a proper case, where the error is apparent from the record, be made at any time, and without notice.—Bentley v. Wright, 3 Ala. 609. Nay, this court itself will correct such apparent errors at the costs of the plaintiff in error; and it would be very strange that this court should now, because the plaintiff in error had not notice of the motion to amend below, restore the error then existing by the misprision of the clerk, when it would immediately turn round and restore the amendment by its own act here.—Smith v. Robinson, 11 Ala. 271; Loomis v. Allen, 7 ib. 706; Mason v. Smith, 1 Stew. 275; Wilkerson v. Goldthwaite, 1 S. & P. 159; Moody v. Keener, 9 Por. 252; 6 ib. 844.

CHILTON, J.—The estate here distributed was in process of administration several years anterior to the passage of the act of the 1st March, 1848, for "Securing to married women their separate estates," &c. And it seems to be conceded, as the record persuasively shows, that the plaintiff in error married one of the distributees before the enactment of the law. The question then comes up, whether this act was intended to secure to the wife choses in action which accrued anterior to its passage, but which the husband had not assigned or reduced into his possession.

The act provides, "That if any woman, before and at the

time of marriage, shall have and own any property, or estate, whether the same be real, personal, or mixed, in possession, remainder or reversion, or if any such estate shall, after marriage, by descent, gift, demise or otherwise, accrue to any woman; all such estate, or other property, shall be taken, held and esteemed in law as the separate estate of such woman, and for her sole and separate use, notwithstanding her coverture: And no husband shall by his marriage acquire a right to the property which his wife had upon his marriage, or which she may after acquire by descent, gift, demise or otherwise," &c.

There is nothing in the language of this act to indicate that it was intended to have a retroactive effect. On the contrary, the terms in which it is couched seem to limit its operation to after acquired property. The general rule, says Mr. Dwarris, is, that no statute is to have a retrospect beyond the time of its commencement, and he adds, that this is not only the doctrine of the English law, but it is also founded on the principles of general jurisprudence.—Dwar. on St. 680.

In Gilmore v. Shuter, 2 Lev. 227, a verbal promise was made to give or bequeath a sum of money in consideration of marriage. An action was brought against the executors on this promise, and the question made upon the special verdict was, whether this promise, which was made before the 24th day of June, 1677, the day on which the statute 29 Car., 2 ch. 3, was passed, was within that statute. The court held that it could not be presumed that the statute was to have a retrospect, so as to take away a right of action which the plaintiff was entitled to before the time of its commencement. But we lately had occasion to examine this question, in the case of Gould v. Hayes, at the present term, which sustains the view here taken, and renders it unnecessary to elaborate this point.

If in this case the husband, at the time of the passage of this law, had the right to reduce the share of the estate of Reuben Vaughan to which the wife was entitled, into possession, by proceedings in the Orphans' Court, whereby his absolute right would have attached *as husband*, this right remained unaffected by the the act. It was a *right* which vested in him by virtue of the marriage, and of which the Legislature did not attempt to deprive him.

The case of McGee & Wife v. Forde et al., 5 Smedes & M.

769, upon the statute of Mississippi for the protection of married women, (H. & H. 332,) also supports the view we have taken of this statute.

The fact that the court of chancery will make the husband do equity, by requiring him to make a suitable provision for the wife, before it will enable him to recover the wife's choses in action, does not militate against our construction of the statute. The wife has the same equity notwithstanding the statute; that is, her equity with respect to property, or rights of property, which accrued to her before the statute, and which had not been reduced to possession by the husband, as husband, remains unaffected by the act, and their respective rights are to be determined without regard to the act.

2. With respect to the amendment, we need only say, that in a proper case, did it appear from the record that the share to be decreed was subject to the statute above referred to, and who the wife was, so as to render the decree in favor of the husband and wife for the use of the wife, there would be no doubt but that the court could have amended the decree so as to have made it conform to the law. But, in the case before us, there was nothing to amend by, so far as the record discloses. The cases in 15 Ala., of Greene v. Fagan's Dist's, 335, in which I did not sit, having been consulted as counsel before I came upon the bench, and Key v. Vaughan & Wife, 497, only show how the judgment should be rendered, according to the statute; but nothing is decided in either of them, nor was any point raised in them, as to the effect of the statute upon the rights of the parties, which had accrued before its passage.

A construction which gives to a statute a retrospective effect, has always been esteemed odious, and will never be indulged unless the language employed requires it. Such statutes are justly considered as violative of every sound principle.—Dwar. on Stat. 681, and cases there cited; 9 Law Lib. 35.

Let the decree be reversed and the cause remanded.

CHAPMAN, Governor, &c. *vs.* WEAVER et als.

1. The statute (Aikin's Dig. 319, § 4,) which gives to paymasters a right to commence a suit against sheriffs and constables for a failure to collect and pay over militia fines, is not repealed by the Act of December 30, 1837, which gives a summary mode of proceeding against such officers for such failure.
2. In an action of debt against a sheriff and his sureties, for a failure on the part of the sheriff to collect and pay over militia fines, the declaration must set forth the names of the persons against whom the fines were assessed, and the several amounts of the fines, as stated in the certificate of the President of the Court Martial.

Error to the Circuit Court of Coosa. Tried before the Hon. Geo. D. Shortridge.

This was an action of debt, instituted in the name of the Governor, for the use of Reuben A. Mitchell, paymaster of the sixty-eighth regiment of Alabama Militia, against the sheriff of Coosa county and his sureties on his official bond. The breach of duty assigned is, that the sheriff failed to collect and pay over, as by law required, the amount of fines mentioned in divers certificates issued by the President of divers Courts Martial in Coosa county. The declaration alleges that the sheriff had received a list of fines assessed by a certain regimental Court Martial, which list contained the names of the persons against whom fines were assessed, and the amount of the fine assessed against each placed opposite his name, the aggregate amount being one hundred and seventy-seven dollars, and that he wholly failed to collect and pay over said fines or any part thereof. The declaration does not state the names of the persons against whom these fines were assessed, nor the amount of each fine. A demurrer to the declaration was sustained by the court below, and this is assigned as error.

Rice & Morgan, for plaintiff in error:

1. To sustain the declaration in this case we refer to Aikin's Digest, 319, § 4; Meek's Supplement, 164-5, §§ 1, 4; ib. 166-7, §§ 6, 1; ib. 172, § 2.

2. The act (Aikin's Dig. § 4,) gives the general remedy against a defaulting officer, an action in proper form and in a court of

competent jurisdiction. The provisions of the Military Code, approved December 30, 1837, are not in conflict with this general remedy, but only cumulative. The general remedy is still available, as it is in the case of sheriffs, who fail to return process, or to collect or pay over money.

3. The objection to the declaration that no process was in the hands of the sheriff upon which he could make a levy, is answered by the 4th section of the act of 1837.

4. There is nothing which prohibits the sheriff from executing the process of the military court, whether the amount is over or under fifty dollars. The statute merely prescribes that the mode of executing the process shall be controlled by the fact whether the amount is over or under fifty dollars.

White & Parsons, *contra:*

1. The declaration is fatally defective in each breach, in not setting out the names of the parties contained in each list. This seems to be an indispensable requisite, so that the party may come prepared to show they were not solvent.—Harrison v. Davis, 2 Stew. 352; Chamberlain v. Gorham, 20 John. 144; 5 Term R. 112; 3 Starkie on Ev. 1457, 1461.

2. The last breach is for a failure to return. The act has been repealed which made the sheriff liable for this cause, and no recovery can now be had on that account.—Broughton v. Mobile Branch Bank, 17 Ala. 828.

3. The sheriff was not bound to execute this process for another reason. It is not shown by the declaration that any one of the fines on each list was for a greater sum than a constable is authorized to collect. There are several fines above that; these the sheriff must collect. This is evidently the meaning of the fourth section of the act, where the paymaster may place it in the constable's hands or the sheriff's. On page 166, section 4th, it is provided that "in any case of levy such proceedings shall be had thereon in every respect, as are required upon executions from a justice of the peace, or the circuit courts, according as the amount of the fines in the particular case, shall be over or under fifty dollars."

The remedy by action of debt arises in favor of any person who is injured or damaged by the failure of the sheriff to discharge the duties required of him by law. In this case, how-

ever, the paymaster can only employ the remedy given him by law, because individually he has no right of action whatever, neither has he sustained damage or injury as Reuben A. Mitchell. The statute says he may recover by motion. This is something more than cumulative; it is the only remedy which the law gives him.—Meek's Sup. 166, § 6.

COLEMAN, J.—The 6th section of the 13th chapter of the Military Code, approved December 30, 1837, which gives a summary mode of proceeding against sheriffs and constables for failing to collect and pay over, &c., militia fines to the proper paymaster, does not repeal the act giving the paymaster a right to commence a suit against said officers for failing to collect such fines, &c., before any court having jurisdiction thereof. We consider the summary remedy given by the act referred to, as merely cumulative, and not in conflict with the provisions of the law giving the general remedy. The objection, therefore, to the mode of suing here is not well taken.

We think, however, that the declaration is defective in not setting forth the names of the persons against whom the fines were assessed, and the several amounts thereof, as stated in the certificate of the President of the Court Martial. This certificate is made by the statute to operate as a several writ of execution against each of the persons named therein.

The general rule of pleading requires that the cause of action be stated with sufficient certainty, clearness and precision to enable the defendant to prepare to defend himself against the action, and to plead a judgment thereon in bar of another recovery, &c. —1 Chitty's Pl. 255. We believe the rule is without exception, that whenever it is necessary to produce the process of any court, either to show the inducement to the cause of action or to sustain the action itself, the declaration must substantially describe such process.—2 Chitty 291. As this view of the case shows that the demurrer ought to have been sustained, we have not thought it necessary to notice the other objections.

Let the judgment be affirmed.

WILSON *vs.* BEARD.

1. An equitable title to land cannot be sold under execution at law, but resort must be had to a court of equity.
2. When mortgaged lands have been sold under a decree of foreclosure rendered by the Chancery Court, and afterwards redeemed under the statute by the mortgagor, and a conveyance taken in the name of a trustee for the use and benefit of his wife, the mortgagor has not such an interest in the redeemed lands as can be the subject of a levy and sale under execution at law.

ERROR to the Circuit Court of Dallas. Tried before the Hon. E. Pickens.

G. W. GAYLE, for plaintiff in error:

1. The statute of redemption suspended McNair's title for two years after the register's sale, and upon his paying the money and 10 per cent., he fell back on his old title from Calhoun. There are many reasons why this construction should be given to the act.

Unless the act operated a suspension of title, the purchase at register's sale would give an indefeasible title to the purchaser.

If upon McNair's paying the money and per cent. King had refused to make a deed, would McNair have had to file a bill for title? No. To carry out the spirit and intent of the statute, unlawful detainer would have been allowed, to let other creditors redeem from McNair. The statute contemplates no long and tedious action of ejectment, or bill in equity, and McNair could not "reconvey" without possession.—See Clay's Dig. 502, § 3.

The provision of the statute requiring King to reconvey is unconstitutional and void as operating to divest vested rights, unless the act suspends the title. Otherwise the register's deed would give the fee. If suspended, then, no reconveyance is necessary.

The statute might properly be considered as making the debtor the mortgagor, and the purchaser the mortgagee. If so, upon payment of mortgage debt, no reconveyance is necessary.

If the analogy is good, as mortgagor and mortgagee, the money here was paid before the law day passed, and no reconveyance was necessary.

2. This case differs from Elmore v. Harris, 13 Ala. 360, and from Hogan v. Smith, 16 Ala. 600. In these cases bonds for title were outstanding. Here there was none. This distinction is taken in Hopkins v. Stump, 2 Harris & Johnson 301.

3. But the error of the court below is demonstrable by another view. The title was fraudulently put in the wife's trustee and created a resulting trust liable to be sold under execution.—See Guthrie v. Gardner, 19 Wend. 414; Davis v. McKinnie, 5 Ala. 719.

LAPSLEY & HUNTER, *contra*:

The only question in this case is whether the plaintiff acquired any title to the lands in question by his purchase at sheriff's sale. It is clear that he acquired no title, because the defendant in execution had no legal title to the land.—Doe ex dem. Davis v. McKinney, 5 Ala. 719, Elmore & Willis v. Harris, 13 ib. 360; Hogan v. Smith, 16 ib. 600.

The title was in King, the purchaser at the register's sale, and could be transferred only by making a deed as directed by the statute.—Clay's Dig. 502, § 2.

If the deed from King to McClanahan was fraudulent as contended by the plaintiff, it would be void and could be set aside, and this being done, would leave the legal title in King, and of course not subject to sale under execution against McNair.

CHILTON, J.—The defendant was sued in an action of trespass to try title and recover damages, for certain lands described in the declaration. The plaintiff claimed the land under a purchase at sheriff's sale, made by virtue of an execution against one McNair, and proved that McNair had purchased the land from James M. Calhoun, and had executed his notes and a mortgage on the premises to Calhoun, to secure the payment; that Calhoun foreclosed the mortgage by decree in chancery, and the land was sold by the Register in obedience to the decree and purchased by one King; that McNair applied to King to redeem the land under the statute (Clay's Dig. 502) and paid him the redemption money; but requested King to make the title to J. M. McClanahan, the trustee for the wife of McNair, which was done to prevent the land from being liable to certain judgments which had been rendered against McNair, and which he protest-

ed he did not intend to pay; that King thereupon executed the conveyance to said McClanahan. Under these circumstances the land was sold, and the Circuit Judge instructed the jury in effect, that notwithstanding the deed from King to McClanahan was made to defraud the creditors of McNair, still it operated to vest the legal title in McClanahan, and left the equitable title only in McNair, which could not be sold under execution at law. This charge, it is insisted by the plaintiff in error, is erroneous, first, because the title of McNair was merely suspended by the operation of the act allowing him to redeem, and that when he paid the money required to make the redemption, he was remitted to his original title derived from Calhoun; secondly, that if such is not the operation of the redemption, still McNair had such title as was subject to sale under execution, namely, a resulting trust in his favor.

It is a proposition too well settled by the decisions of this court now to be controverted, that an equitable title to land cannot be sold under an execution at law, but resort must be had to equity for its sale, after exhausting the legal remedy.—Doe ex dem. Davis v. McKinney, 5 Ala. 719; Elmore & Willis v. Harris, 13 ib. 360; Hogan v. Smith, 16 ib. 600; Clay's Digest, 350, § 31.

Was the interest of McNair legal or equitable? Suppose the deed to McClanahan were held void for fraud, where would the title then be? Most unquestionably in King. This shows that the alleged fraud in making the deed to McClanahan instead of McNair, cannot have the effect of vesting the legal title in the latter. It is wholly unlike the case of a fraudulent conveyance by a debtor of his estate to delay, hinder, or defraud creditors, upon which the statute operates and declares void as to the creditors whose debts are delayed, &c.—Clay's Dig. 254, § 2. Here the legal title is in King, who purchased under the decree of foreclosure, and who, but for the statute authorizing a redemption or re-purchase by McNair, would have taken an indefeasible title. It is too plain, we think, for argument, that after the mortgage has been regularly foreclosed, or a sale decreed by a proper proceeding in a court of equity, and the land is sold and a title executed to the purchaser by the direction of the Chancery Court, or in conformity to the decree, the title, which the parties to the suit had, vests in the purchaser. The mort-

gagor is thrown upon the statute to re-purchase, by paying the amounts thereby prescribed, and upon such payment, is entitled to a re-conveyance. If the party against whom the statute authorizes the redemption, refuses to convey, a court of equity in a proper case will compel him to do so, and thus re-vest the mortgagor with the title. But we have seen no case which holds that the payment of the money operates to vest any title *at law* in the absence of a deed under the circumstances here presented. This is not the case of the mortgagor paying the money due upon the mortgage to the mortgagee, or his assigns, whereby the mortgage becomes defeated and released after satisfaction entered according to the provisions of the statute.—Clay's Dig. 156, § 32. The right of redemption, so far as secured by the mortgage, is taken away and barred by the foreclosure, and can only be asserted under the statute, and we see no more reason for holding that the payment by the original mortgagor shall re-vest the title without any conveyance, than if such payment had been made by any one else entitled to redeem under the statute.

The counsel says this is a resulting trust in favor of McNair. Grant this proposition, still it by no means follows that it confers a legal right upon McNair. On the contrary, the fact that a trust does result from the payment and the execution of the deed to McClanahan, is conclusive to show that the right of McNair is equitable. If the conveyance to McClanahan was made in fraud of the rights of McNair's creditors, a court of equity would most unquestionably imply a trust in favor of McNair, so as to subject it for the payment of his debts. Whether this would be done in favor of McNair himself, the claims of creditors aside, is another question, and one upon which we are not called upon to express an opinion. It is clear, we think, that if the creditors of McNair would subject his interest, they must resort to a court of equity, which alone can enforce the trust for their benefit.

The cases in New York, which militate against this view, arose under statutes very different from ours, (1 Rev. Stat., ed. of 1829, 727,) and cannot therefore be regarded as authorities in point. There is certainly as strong reason for holding a resulting trust beyond the reach of legal process, as an equity conferred by bond for title. The statute makes no distinction between equitable titles, whether by bond or by parol. Whether

the trust is expressly declared in writing or is left to be implied from the nature of the transaction, so long as it confers but an equity, that equity cannot be sold under legal process. The case of Doe ex dem. Davis v. McKinney, *supra*, we think is decisive of this case, and aside from that decision, were the question now for the first time presented, we should feel constrained to hold that McNair had not such interest under the facts presented as could be sold under execution at law.

Judgment affirmed.

PETTY *et als. vs.* BOOTHE *et als.*

1. An ante-nuptial contract was entered into between B. and M., in the following language: "Whereas a marriage is about to be solemnized between B. and M., and the said M. is likely to bring into the marriage property of some value, and it being desirable that provision should be made for her maintenance and support, it is therefore agreed and stipulated, that the real estate and negroes which were devised to the said M. by her father, and all other property which she may otherwise hereafter inherit, shall be held and remain the separate and distinct property of the said M., not subject to any other disposition save by the joint consent of herself and one of the trustees hereinafter named. The said property, however, to be and remain in the possession of the said B., for the benefit of the parties. It is further stipulated, that said property shall descend and be inherited by the children of the said M., if she has any; but if none, or in case of their death before marriage or arriving at the age of twenty-one years, then said property to go to said B." Trustees are also appointed "for the said M. to protect her interest and to attend to the due execution" of the instrument; and by another provision, one of the trustees "shall have full power to sell and dispose of the real estate of said M. whenever he may see proper to do so, and appropriate the funds in such way as he may think best for her interest." *It was held*,

1. That the contract gives to the wife such a separate estate in the slaves conveyed by it, as entitles her exclusively to their labor and profits; and which cannot be defeated by her husband, or subjected to the payment of his debts.

2. The possession of the husband "*for the benefit of the parties*," must be construed to mean for the use of the wife during her life, and at her death, for those who might be entitled to the remainder according to the provisions of the deed.
2. In the construction of deeds, if there are two clauses which are inconsistent and irreconcilable with each other, the last must give way to the first.
3. When subsequent words in a deed are of doubtful import, they will not be so construed as to contradict preceding words which are certain.

Error to the Chancery Court of Barbour. Tried before the Hon. J. W. Lesesne.

Sayre, for plaintiffs in error:

1. Under the marriage settlement, Boothe, the husband, retained an interest for life in the property, therein mentioned. The deed recites that the property is to be and remain in possession of Boothe, for the benefit of the parties.—15 Ala. 169. The property was to be held by Boothe, for the "benefit of the parties;" that is, for the benefit of the parties to the deed. In law, the husband and wife are one person, and when property is vested in husband and wife, it is held by the husband in his own right.—15 Ala. 176; 17 ib. 644. The deed does not specify in what that benefit should consist; it is therefore a general use, and can be subjected to the payment of debts.—10 Ala. 743. The deed specifies that the property should be the separate and distinct property of Mrs. Boothe; that is, that the legal title should be in her, or vested in trustees for her, but it nowhere reserves for her a separate and distinct interest in the proceeds of the property. This brings it within the principle of the case, (Pollard et al. v. Merrill et al., 15 Ala. 169,) where the property was to be secured for the use and exclusive benefit of the intended wife; but the profits were to be held for the joint maintenance and support of the husband and wife. Such also was the intention in the case of Moss v. McCall, 12 Ala. 630. The object in all these cases was, to prevent the legal title from vesting in the husband; to vest in husband and wife the proceeds of the property; to place both the property and the proceeds thereof beyond the reach of creditors. Such being the case, the property was subjected to the payment of debts. The beneficial interest in property, or its produce, whether the legal estate be

vested in a trustee or not, may be charged with the payment of the debts of the proprietor. No one can have a legal or equitable right to property, which is not subject to the payment of his debts, either at law or by a proceeding in equity. Whenever a debtor can claim a general use, benefit or interest in the property, it may be reached by his creditors.—Rugely & Harrison v. Robinson, 10 Ala. 740. In the case at bar, there seems to have been no attempt to exclude creditors; the sole object seems to have been to exclude Boothe's children by a former marriage. The intention to exclude the husband must appear unequivocally on the face of the instrument.—12 Ala. 47; 15 Ala. 173-4; 12 ib. 635. The court cannot look to the context to discover the intention of the parties.—Bell on Hus. & Wife, 304. A deed must, if possible, be so construed that all of its parts may stand. There are but four stipulations in this deed, and no one of them is inconsistent with another. The intention seems to have been, that Boothe should have had some benefit from the property after the marriage. To exclude him from all benefit, would not only violate the express terms of the deed, but also the intention appearing on its face. There is no evidence that Boothe would have consented to the execution of any deed, by which he would have been excluded from all benefit of the property. If the intention was to allow Boothe some benefit, and also to exclude creditors from subjecting that "benefit," it was an intention which this court will not countenance; for it is attempting to do that which the law will not tolerate.—12 Ala. 47.

2. In order to give the court jurisdiction to reform a deed, the ground upon which the reformation is sought must be established by clear and satisfactory proof.—1 Story's Com. on Eq. 164, § 152; 11 Ala. 190; 1 ib. 171. The mistake must be mutual, if there is no fraud.—1 Story's Eq. 167, § 155. This court has already decided, that the decree of the chancellor in this particular case operated only as a deed of settlement by the husband on the wife, and cannot affect a judgment creditor, except it be sustained by extrinsic proof.—12 Ala. 123. So that it was the duty of the defendants in error to establish all the facts upon which the decree of the chancellor was based.

The bill filed to reform the marriage contract alleges, that it was agreed between the parties, that after the marriage the property was to remain in the possession of Boothe, for the sole and

separate use and benefit of Mrs. Boothe; that Boothe represented that the contract, afterwards drawn up, contained said contract; that Mrs. Boothe executed said contract under the belief that such was the fact; that before the execution of said contract, Boothe read over to his intended wife the contract, but misread it, in this, that instead of reading the words, "after said marriage, for the benefit of the parties," as written in the deed, he read, "after said marriage, for the benefit of said Martha;" and that he then read the instrument actually drawn up, as securing to Mrs. Boothe not only the legal title, but also the profits thereof. All these things constitute the consideration of that decree, and must be proved in order to give that decree any effect against creditors. The consideration stated must be proven, and not a different one.—16 Ala. 94. But not one of the above facts is established by the proof in this case.

Creditors may join in filing a bill.—10 Ala. 432.

The excuse of ignorance is not favored by courts of equity; and the mistake must be clearly and satisfactorily established. Boothe and wife rested perfectly contented under the deed, for years, and it is not until judgments are obtained that the mistake was discovered.—Stone v. Hale, 17 Ala 561.

Fraud or mistake are the only grounds upon which a court of chancery has jurisdiction to reform written contracts.–1 Ala. 165.

The facts which constitute the fraud or mistake, must be alleged in the bill and proven on the trial.—6 Har. & Johns. 28.

A court of equity will not interfere to alter or reform written contracts, unless the proof be clear beyond a doubt, because it is better that a doubtful written instrument should stand, than that a doubtful provision should be substituted by parol testimony.—2 How. Miss. 718.

Buford, *contra:*

I. Upon the theory that the legal effect of the deed gives the husband an interest—

1. The witnesses, Mrs. Harrison and Mrs. Pease, show the intention of the parties was different, and it would be a fraud in Boothe or his creditors to give the marriage contract a different effect; and in case of such a fraud attempted, in reference to a deed intended for a mortgage, equity would interpose—(see authorities cited by defendant, in Bryan & McPhail v. Cowart, at this term)—and marriage settlements being of greater public

concernment and more liable to misapprehensions, are, at least, equally entitled to be classed as exceptions to the general rule against parol evidence.

2. Boothe's interest (if any he had) was not separable from his wife and children's, and so not liable to his debts.—Rugely v. Robinson, 10 Ala. 702; and see opinion of C. J. Collier in that case; Lavender v. Lee, 14 ib. 692-3-4. Especially as trustees' assent was necessary to charging the property.—Rugely v. Robinson, 10 Ala. 722-3, *supra.* "The benefit of the parties," as per deed, required the property "to remain in Boothe's possession;" and so it was not liable, even by dissenting opinion of C. J. Dargan, in 14 Ala., *supra.*

3. The deed was reformed, and the evidence vindicates that reformation, and shows mistake of fact.

1. Mrs. Harrison, says, Mrs. Boothe, on account of B.'s gaming propensity, would not marry without "a marriage contract." Witness suggested to B. the difficulty, a day or two before the marriage, and in a few minutes the contract was drawn and signed. Didn't hear it read, but Boothe called it "a marriage contract."

2. Mr. Pease. Before the marriage, Boothe said the contract settled the property on Mrs. B.; Boothe was in debt and reputed insolvent; Mrs. B. postponed the marriage once or twice in consequence; she was often at witness' house; his wife (the subscribing witness) her only adviser; both incapable of understanding legal instruments; her relatives opposed the marriage.

3. Mrs. Pease, (subscribing witness)—Mrs. Boothe near seventeen, modest and retiring, and inexperienced; guardian transacted her business affairs, and opposed to her marriage; contract one or two days before marriage; not certain if contract was read, or if so, by whom; "before it was signed, it was explained to Mrs. B. as securing her property to herself, free from Judge Boothe's debts and contracts;" "this was the understanding of its effect by all present at its execution;" Mrs. B. was apprised of B.'s embarrassment; she often conversed with witness about her intended marriage, &c.

Deed reformable against creditor, with *fi. fa.* levied.—Stone v. Hale, 17 Ala. 557-62-3; 1 Story's Com. 131-2. And laches not imputable till after discovery of the mistake.—17 Ala., *supra;* see 1 ib. 170; 8 ib. 553; 9 ib. 578.

4. Such deeds will be reformed without proof of mistake, in fact, but "where the only evidence is that arising from the general circumstances and ignorance of the parties."—Ball v. Storie, 1 Eng. Ch. 219, (there the deed was drawn by attorney, as in 17 Ala., *supra*,) and see note; Lavender v. Lee, 14 Ala. 692-3-4, and 17 Ala., *supra*.

II. But the marriage contract gives Mrs. Boothe the exclusive interest.

1. If a separate estate is expressly, or by just implication, intended, equity will give that intent effect.—Clancy on H. & W., book 3, ch. 1, p. 251; Story's Com. Eq. 128-9-131-2-3-4-5-6-7-149-157, and 2 ib., § 1381; Cruis. Dig., tit. Deed, 293-96; 2 Ala. 255, and Br. Bank Mobile v. Dunn & Wife, 2 ib. 155.

2. In settlements made in contemplation of marriage, the presumption is in favor of separate interest.—Lamb v. Wragg, 8 Por. 82; 4 Dess. 447; Chauncey's Rights of, &c., 262; 7 Vin. Ab. 95.

3. The proviso, if repugnant, is void; its "*sotto voce*" whispers of fraud.—1 Steph. Com. 464, § 7. If falsely read, deed is void, (1 Steph. Com. 456,) and repugnant condition is void.—2 Bac. Ab. 301. So of statutes even.—1 Kent's Com. 462.

4. Boothe's custody is a mere naked custody, "for the benefit of the parties" *sub modo* the deed.—Williams v. Claiborne, 7 Smedes & M. 488.

III. Boothe had possession at and three years after judgment. Remedy exists at law, or if lost by laches, equity will not relieve.—French v. Garner, 7 Por. 49; Mock v. Cundiff, 6 ib. 24.

DARGAN, C. J.—John P. Boothe and Martha R. W. Hodges, just before their intermarriage, entered into a contract respecting her property, which is in the following language: "Whereas a marriage is about to be solemnized between John P. Boothe and Martha R. W. Hodges, and the said Martha is likely to bring into the marriage property of some value, and it being desirable that provision should be made for her maintainance and support, the said Boothe having children by a former marriage, it is therefore agreed and stipulated, that the real estate and negroes that were devised to the said Martha by her father, Richard Hodges, of the State of Georgia, also all other property which she may otherwise hereafter inherit, shall be held

and remain the separate and distinct property of said Martha, not subject to any other disposition, save by the joint consent of herself and one of the trustees hereinafter named and appointed; the said property, however, to be and remain in the possession of the said John P. Boothe, for the benefit of the parties. It is further stipulated, that said property shall descend and be inherited by the children of the said Martha, if she has any; but if none, or in case of their death before marriage, or arriving at the age of twenty-one years, then said property to go to said Boothe. It is further agreed, that George C. Hodges, one of the trustees hereinafter named, shall have full power to sell and dispose of the real estate of said Martha, whenever he may see proper to do so, and appropriate the funds in such way as he may think best for her interest. It is also stipulated and agreed, that George C. Hodges and James W. Exum be, and they are hereby appointed trustees for the said Martha, to protect her interest and to attend to the due execution of *this instrument.*"

The marriage was consummated, and some of the slaves were hired, and the notes for the hire were taken in the name of George C. Hodges as trustee. Previous to the hiring, however, the slaves had been in the possession and under the control of Boothe. The complainants having obtained a judgment at law against Boothe, *who is insolvent*, have filed this bill to subject the money due for the hire of said slaves to the satisfaction of their debts. Upon these facts, the question arises, whether the contract gives to Mrs. Boothe such a separate estate in the slaves as entitles her exclusively to their labor and profits. The reciting part of the deed clearly shows that the inducement to its execution was to provide a support and maintenance for Mrs. Boothe; and the first clause of the granting part (if it may be so termed) fully executes the intention of the parties. The language is, "it is therefore agreed and stipulated, that the real estate and negroes that were devised to the said Martha, by her father, Richard Hodges, of the State of Georgia, also all other property which she may hereafter otherwise inherit, shall be held and remain the separate and distinct property of the said Martha, not subject to any other disposition, save by the joint consent of herself and one of the trustees hereinafter named and appointed." This clause clearly secures the property to her, and gives her a separate estate that could not be defeated by her

husband, nor subjected to the payment of his debts. It is the next succeeding clause that throws doubt upon the subject, which is as follows: "The said property, however, to be and remain in the possession of the said John P. Boothe, for the benefit of the parties." From this clause, it is argued that Boothe, the intended husband, was not only entitled to the possession, but also to the profits, for the joint benefit of himself and wife. If this is the proper construction, then it is clear that the husband would take the entire profits; for it is the settled law in this State, that personal estate cannot be limited to the joint use of husband and wife; and when it is attempted so to convey personal estate, the husband will take the whole, to the exclusion of the wife.—Allen & Wife v. White, adm'r, 16 Ala. 181; Moss v. McCall, 12 Ala. 630; Bender v. Reynolds, ib. 446; Pollard v. Merrill & Eximer, 15 Ala. 169. But I cannot give to this clause such a construction; it would not only defeat the object of the deed, as gathered from the reciting part, but it would destroy the estate of the wife in the slaves, which is secured to her by the preceding clause; for if the husband is entitled to the profits of the slaves under this clause, then there is no contingency in the deed that will divest his interest, save the death of the wife, leaving children surviving her, who should attain the age of twenty-one years, and thus the wife would be excluded from all interest in them. It is one of the rules in the construction of deeds, that if there be two clauses which are utterly inconsistent with each other, and which cannot be reconciled, or made to stand together, the last shall give way to the first, the maxim being, "*the first clause in a deed, and the last in a will shall prevail.*"—2 Greenl. Cr., tit. Deed, ch. 2, p. 300. Even by this rule, (which should never be resorted to until all efforts to reconcile the conflicting parts have failed,) we should have to protect the estate secured to Mrs. Boothe by the first clause, at the expense of the latter. But if upon a view of the whole instrument, effect can be given to the subsequent clause or meaning to the subsequent words, consistent with the preceding clause, it is then the duty of the court so to construe them. Let us see if meaning and effect cannot be given to the subsequent clause in this case, consistent with the separate estate secured to Mrs. Boothe by the first clause. The manifest intention, in the first place, was to make a provision for Mrs. Boothe, and by a subsequent part of the

deed, it is provided, that the property should descend and be inherited by her children. This limits her interest to an estate for life, and creates a remainder in favor of her children. It is then further provided, that if she should have none, or if they should die before arriving at the age of twenty-one, then the property should go to the husband. The children, therefore, of Mrs. Boothe, as well as Boothe himself, have a contingent interest in the slaves, and it may be supposed that Boothe, on their account, as well as on account of his wife and himself, would feel an interest in the preservation and increase of the slaves. For this reason the stipulation may have been inserted, that he should have the possession of the slaves, *for the benefit of the parties;* meaning by the term parties, those who took an interest in the slaves, *according to the provisions of the deed ;* that is, that Boothe should have the possession of the slaves, for the separate use of his wife during her life, and after her death, for himself or her children, as the contingency might happen. This construction would give him the possession of the slaves, not for his own use, but for the use of all that took an interest in the deed, according to its provisions ; that is, for the separate use of his wife during her life, and then for her children, if she had any, and if not, for himself. This construction would give meaning and effect to the words used in the latter clause, and would not be repugnant to the preceding one ; and this, I think, is the proper construction to be given to the second clause. It may, however, be said, that it is doubtful whether such was the intention of the parties. But to this it may be answered, that when the subsequent *words* are of doubtful import, they should not be so construed as to contradict the preceding words, which are certain ; but if any effect can be given to them, consistent with the preceding part of the deed, they should be so construed. In any point of view that we are able to take of this case, we think the deed gives Mrs. Boothe a separate estate in the slaves, and also in their hire or profits, during her life ; for if I have failed to show that the second clause can be construed consistently with the first, then it is evident that the second is inconsistent with the first, as well as repugnant to the object of the deed, as evinced by its recitals ; and this inconsistency, instead of destroying the precedent estate, would render void the subsequent clause.

Let the decree be affirmed.

WILSON, USE, &c. *vs.* CANTRELL, ET ALS.

1. When the official bond of a county treasurer is defective as a statutory bond, but good as a common law bond, suit can only be brought upon it in the name of the obligee.
2. An official bond of a county treasurer, the condition of which is in the precise words and form prescribed by the Act of 1839, (Clay's Dig. 577, § 11,) and refers specially to the act by virtue of which the bond was executed, and on which is endorsed the oath prescribed by the act, subscribed by the treasurer, is a good statutory bond, although it does not recite that the principal obligor is the county treasurer, or that he was elected as such.
3. The eighteenth section of the act of 1839, (Clay's Dig. 580, § 27,) which inflicts a penalty on a county treasurer for a breach of duty, does not deprive a party, who is injured by such breach of duty, of his right to bring an action on his official bond against the treasurer and his sureties.
4. In an action of debt against a county treasurer and his sureties on his official bond, a recovery can only be had for injuries necessarily affecting the rights of the party for whose use the suit is brought.
5. In debt on bond, a demurrer will not lie to a whole count which assigns several breaches, some of which are good.

ERROR to the Circuit Court of Benton. Tried before the Hon. L. P. Walker.

J. B. MARTIN, for plaintiff in error:

There can be no valid objection to this as a statutory bond. It is a literal transcript of the form prescribed by the statute in every particular. True, the term treasurer does not immediately follow the name of the obligor, nor does it appear in the form laid down in the statute But the bond affirms on its face that it was a treasurer's bond. It imposes duties required of no other officer. The act requiring the bond and prescribing the duties of county treasurers is referred to by title and date in the body of the bond itself, and upon the back of the bond, and of the same date, is the sworn obligation of the obligor to discharge the duties of treasurer, &c.—Clay's Dig. 577, § 11. The absence of the title "treasurer," if even strictly proper, which is doubted, is a mere clerical omission which will not affect the instrument sued upon as a statutory bond, especially when taken in connection

with the averments of the declaration.—Bagby, Gov. v. Chandler et al., 8 Ala. 230; ib. 9 ib. 770; Anderson v. Rhea, 7 ib. 104; Sanders & Fenwick v. Rives, 3 Stew. 109; Robins et al. v. The Governor, use, &c., 8 Ala. 839; Boring et al. v. Williams, Treas., 17 ib. 510.

2. But it is insisted, that whether this bond is good as a statutory bond, is utterly immaterial, as no statutory or summary remedy is sought upon it, and the declaration, if its averments be true, presents a perfect cause of action according to the common law.—Whitsett v. Womack, use, &c., 8 Ala. 466; Meredith v. Richardson & O'Neal, 10 ib. 828; Robins et al. v. The Governor, use, &c., 6 ib. 839; Hodson v. Morse, 5 Mass. 314; 10 ib. 21; 18 Pick. 257.

3. The bond was voluntarily executed, was founded upon a sufficient consideration, and is not declared illegal by the common or statute law.—Clap, Adm'r., &c., v. Cofran, 7 Mass. 98, and authorities cited above.

4. It is perfectly competent for us to aver and prove by parol that the bond was intended and given as treasurer. To do so, will nether add to, contradict, nor vary the instrument, but simply supply that which was omitted, but which the bond itself shows was intended to be inserted.—Bennehan v. Webb et al. 6 Iredell's N. C. R. 57; Kincannon v. Carroll, Gov., &c., 9 Yerger's R. 11; Commissioners v. McCalmont, 3 Pennsylvania 122; Penniman v. Banymore, 6 Martin La., 494; Nicholas v. Krebs, Ex'r., 11 Ala. 230; Mundine v. Crenshaw et al. 3 Stew. 87; Meade v. Steger, 5 Por. 498; Baldwin v. Carter, 17 Conn. 201.

5. Some, at least, of the breaches being good, a general demurrer will not reach even those which may be bad.—Watts, Ex'r. v. Sheppard, 2 Ala. 425; Taylor v. Pope, 3 ib. 190; Botts v. Bridges, 4 Por. 274.

6. The suit is properly brought in the name of the judge of the county court.—Governor, use, &c. v. Gantt, 1 Stew. 388; Bagby v. Chandler, 8 Ala. 250; Polk v. Plumer et al. 2 Humph. 500. The suit is properly brought for the use of the county treasurer. He is entitled to all monies and effects belonging to the county, and it is expressly made his duty to prosecute suits for the collection of the same.—Clay's Dig. 578, § 15; ib. 580, § 26.

JOHN FOSTER, *contra:*

1. The bond declared on is not drawn in compliance with the provisions of the statute. It was not executed as a treasurer's bond.—Clay's Dig. 576.

2. If the bond cannot be considered as a statutory bond, though it might be valid at common law, the obligee or his personal representatives are the only parties entitled to sue, and the present plaintiff cannot maintain the action.—Justices of Cumberland v. Armstrong, 3 Dev. 286; Jones v. Wiley, 4 Humph. 146; Hibbats v. Canada, et al. 10 Yerger 465.

There is a misjoinder of causes of action. The breaches assigned, are, 1. For not paying claims on the county presented by Robinson Dothard et al. For this breach the persons holding the claims should sue.—Clay's Dig. 479, § 24. 2. For not accounting with commissioners' court when required so to do. For this breach any person might sue and recover the penalty, one half of which only goes to the county.—Clay's Dig. 580, § 27. 3. For not paying over money to his successor, Woodward. It is clear that the last breach is the only one for which the present plaintiff could sue, even if the obligation is to be considered a statutory bond. In all official bonds the obligee holds a mere naked trust for the benefit of all persons interested, who only have a right of action, and must in the declaration show themselves to have been damnified.

The declaration alleges that the county of Benton has been damnified, not Woodward, the treasurer, for whose use suit is brought.

If the bond sued on is a statutory bond, there is no authority given to Woodward, the successor of Cantrell, to put it in suit in name of Judge of County Court.—Judge of Benton County Court v. Price et al. 6 Ala. 38.

If Woodward, as treasurer, can sue at all, the action must be brought in his own name for the use of the county, for by operation of law, he is vested with the legal interest in the bond.—Clay's Digest, 578, § 15; The Auditor v. Woodruff, 2 Ark. 74; Taylor et al. v. The Auditor, 2 Ark. 186.

After demurrer for misjoinder, it cannot be cured by withdrawing or *nol. pros.* one count.—1 Chitty's Pl. 436.

COLEMAN, J.—This action was brought to recover damages for alleged breaches of the official bond given by Aaron Can-

trell, as the treasurer of Benton County. The first count in the declaration having been withdrawn by the plaintiff by permission of the court, the demurrers to the remaining counts separately, and to the whole declaration, were sustained.

The bond is made payable to James L. Lewis, as Judge of the County Court of Benton County, and his successors in office, and the suit is brought in the name of Robert L. Wilson, as his successor. We think it very clear that if the bond is not a good statutory bond, the suit was improperly brought in the name of Wilson. For if it is good merely as a common law bond, the right to sue thereon would be in Lewis, the obligee.

The question, therefore, presented for our consideration is whether the writing obligatory sued on is a good statutory bond. It is insisted by the defendant's counsel that the bond is defective according to the statute, in not stating that the obligor, Cantrell was the treasurer of Benton County, and that it does not appear in the bond that he had been elected as such.

The first section of the act of 1839, in relation to county treasurers, (Clay's Digest, 577,) after directing that the county treasurer shall give bond in double the amount of the estimated revenue of the county, payable to the Judge of the County Court and his successors in office, prescribes the form in which the condition to the bond shall be written.

We find the condition to the bond sued on precisely in the words and form prescribed by the statute, and the condition refers specially to the act by virtue of which the bond was executed. We also find endorsed on the bond an oath subscribed by the defendant Cantrell, as prescribed by the statute, in which he swears to perform the duties of county treasurer.

The condition to the bond setting forth all the duties required of the obligee as treasurer of Benton County, and referring specially to the act under which it was given, as clearly indicates the character of the bond and the purpose for which it was given, as if the word treasurer had been affixed to the name of the obligor wherever it occurs in the bond. We have therefore no hesitation in declaring it a good statutory bond.

By the 18th section of the act referred to, it is declared that if any county treasurer shall fail to comply with the duties required of him by this act, he shall forfeit not less than one hundred, nor more than two hundred dollars, to be recovered before

any court of competent jurisdiction; one half to the use of the proper county, and the other half to the person suing for the same.

It is contended that the recovery given by this section takes away the general remedy as pursued in this case, and that the declaration therefore improperly alleges as a breach that the defendant failed and refused to account, &c. We think that it was intended by the foregoing section, to inflict a penalty for a breach of duty of an officer, and not deprive a party aggrieved by such breach of duty, of the right to sue the treasurer and his securities. To hold otherwise, would make it a superfluous act to take bond and security of the treasurer, and the aggrieved party might find the penalty of two hundred dollars very inadequate compensation for the injury sustained.

It is alleged, as one of the breaches in the declaration, that Cantrell refused to pay certain claims due to individuals therein specified. We do not think that a recovery can properly be had in this suit for any injury to a third person. A recovery can only be had here for an injury necessarily affecting the rights of the party for whose use the suit is brought. The plaintiff had no right, as treasurer, to demand of Cantrell the amount of an individual's claim on him as former treasurer, and therefore could not sue for it. But as there are good breaches laid in the same count, and there is a demurrer only to the whole count, and not to the breaches separately, the demurrer must be overruled.

We think the court erred in sustaining the demurrers to the separate counts and to the whole declaration. The judgment is therefore reversed and the cause remanded.

BLANN *vs.* CROCHERON.

1. The mere recovery of a judgment against one of several joint trespassers will not preclude the plaintiff from proceeding to judgment against the others.
2. Whether suing out execution on his judgment will be a bar to a subsequent suit against others. QUERE?

ERROR to the Circuit Court of Dallas. Tried before the Hon. Geo. Goldthwaite.

G. W. GAYLE, for plaintiff in error:

1. When joint trespassers are sued jointly and plead separately, or are sued separately, plaintiff may recover against both, but can have but one satisfaction.—Knickerbocker v. Colver, 8 Cow. 111; Livingston v. Bishop, 1 J. R. 290; Lansing v. Montgomery, 2 ib. 382; Layman et als. v. Hendrick, 1 Ala. 212.

CAMPBELL, *contra.*

DARGAN, C. J.—This was an action of trespass against the defendant, for causing an attachment to be levied on one hundred bushels of corn belonging to the plaintiff, which was exempt by law from levy and sale. The defendant pleaded the recovery of a judgment against the constable for levying the attachment, but did not aver in his plea that the judgment had been satisfied. The plaintiff demurred to the plea, but his demurrer was overruled. The plaintiff then replied that the judgment against the constable had not been satisfied. To this replication there was a demurrer, which was sustained, and judgment was rendered for the defendant. The English authorities, it is true, seem to hold that a recovery against one joint trespasser is a bar as to the others, although there be no satisfaction of the judgment recovered.—See 1 Chitty's Pl. 88, and cases cited in note. But all the authorities agree in this, that the plaintiff is not compelled to sue all jointly; he may do so if he chooses, and if he does, he is entitled to a joint judgment against all.—Layman et al. v. Hendrick, 1 Ala. 212. But he may sue any one separately without joining the others, and this to my mind is conclusive to show that their liability is joint and several, for all or any one may be

sued at the election of the plaintiff. If their liability is joint and several, the liability of all must continue until there has been a satisfaction, and judgment without payment cannot be a satisfaction.

In the case of Livingston v. Bishop, (1 Johns. R. 290,) it was held that separate actions might be brought against several joint trespassers, in each of which the plaintiff might proceed to judgment, and then elect *de melioribus damnis*, and issue his execution against one, which is a determination of his right to elect, and precludes him from proceeding against the others, except for his costs. The principle decided in this case was again recognized in the case of Osterhout v. Roberts, (8 Cow. 43,) and the Supreme Court of Massachusetts admitted the same rule in the case of Campbell v. Phelps, (1 Pick. 62.) So it was said by this court, in the case of Layman v. Hendrick, *supra*, that the injured party may proceed against the trespassers jointly as well as severally, but he cannot have several satisfactions for the same trespass. This I take to be the correct rule, for the trespassers being severally as well as jointly liable, they cannot be discharged from their liability until there is a satisfaction of it, and the mere rendition of judgment, without more, against one joint trespasser, will not preclude the plaintiff from proceeding to judgment against the others. Whether his suing out an execution against the one against whom the recovery was had, will be considered as determining his election, and bar a subsequent, or another suit against the other joint trespassers, it is not necessary to decide, for there was no execution in this case; but it would seem from principle, that nothing but satisfaction could be relied on by one who is jointly and severally liable.

Let the judgment be reversed and the cause remanded.

CHAUDRON *vs.* FITZPATRICK, Gov'r, &c.

1. A demurrer to a plea opens the previous pleadings and reaches back to the declaration.
2. A bond taken by the justice of the peace from a party charged with the paternity of a bastard, conditioned for his appearance at court, &c., as required by the statute, (Clay's Dig. 134, § 2,) is properly made payable to the Governor of the State for the time being and his successors in office.
3. An action of debt on a bond payable to the Governor for the time being and his successors in office cannot be maintained in the name of the obligee, as Governor, after he has gone out of office, unless the suit is brought for the use of a third person who may be responsible for the costs and entitled to the recovery.

ERROR to the County Court of Mobile.

PERCY WALKER and CAMPBELL, for plaintiff in error:

The declaration is bad—1st. Because it should have been in the name of the successor of Fitzpatrick.—4 Wend. 406.

2. Because there is no averment that the defendant, Hoskins, was called to appear according to the tenor of the bond.—4 N. Hamp. 366.

The ruling of the court below on the second plea was erroneous, as the judgment thereon was not rendered upon a default of the defendant, Hoskins, to appear, but upon his not abiding the order of the court. The replication to that plea is the only part of the record averring any breach.

The judgment below is erroneous. There should have been a jury, or a suggestion on the roll of breaches, &c.—Clay's Dig. 330; 1 Saund. Pl. & Ev. 319-20.

The judgment is improperly entered, in being rendered to the use of Mary Shea, the mother of the bastard.—Trawick v. Davis, 4 Ala. 333.

The bond is larger than the statute and requires duties not enjoined by it, and is therefore void.—Clay's D. 134; 2 Mar. 63.

The statute simply requires the reputed father to appear in court, and if he does so, his securities are discharged.

The bill of exceptions in the original cause against the putative father, and which forms a part of the record, shows that he did appear. That appearance absolved his surety, and it was

the duty of the County Court to require a new bond. The continuance of the cause at his instance may have kept the bond in force as to himself, but not as to the security.

PHILLIPS, *contra:*

The defendant was liable to an action on the bond, for failing to appear, though no conviction was had against him; and it was competent to render the judgment for the statutory penalty, without the intervention of a jury.—Lake & Barron v. Governor, 2 Stew. 395; Trawick v. Davis, 4 Ala. 331; Jordan v. Lovejoy, 20 Pick. 86.

The bond required by the statute continues in force until the case is disposed of, or the sureties are discharged by an order for that purpose.—Trawick v. Davis, 4 Ala. 331; Taylor v. Hughes, 3 Green. 433; Blood v. Merrill, 17 Verm. 598.

The plaintiff, who sues on a penal bond, may frame his declaration on the penal part, without assigning breaches.—Herndon v. Forney, 4 Ala. 243.

The continuance was within the discretion of the court, and could be set aside by order for that purpose.—Innerarity v. Frowner, 2 Ala. 150.

The conditions of the bond not required by the statute, do not vitiate the bond.—Polk v. Plummer, 2 Humph. 500; McCaraher v. Commonwealth, 5 Watts & S. 21; Ring v. Gibbs, 26 Wend. 502; Dixon v. United States, 1 Brock. 177-195; Sanders v. Rives, 3 Stew. 109; Whitted v. Governor, 6 Por. 335.

A bond, though not taken in the manner prescribed by the statute, may be good as a voluntary deed.—State v. McAlpin, 4 Ired. 140; Howard v. Brown, 8 Shep. 285; Seawell v. Franklin, 2 Por. 493.

A judgment in a bastardy proceeding will not be reversed because the judgment entry omits to state in whose favor the judgment was rendered.—Yarborough v. Judge County Court, 15 Ala. 556.

There is no error in the judgment, which asserts that it was for the use of Mary Shea.—State v. Dorsey, 3 Gill & J. 74. And, again, there is no such error assigned; and is a matter of which defendant cannot complain.

The bond is payable to the Governor of the State, and the name of Fitzpatrick might be struck out.—Governor v. Allen & McMurdie, 8 Humph. 183.

CHILTON, J.—This was an action of debt, upon the penalty of a bond executed by the plaintiff in error as surety for one Henry Hoskins, payable to Benjamin Fitzpatrick, Governor of the State of Alabama, and his successors in office. The writ and declaration are in the name of Benjamin Fitzpatrick, describing him as Governor of this State, whereas the suit was instituted on the 8th day of June, 1847, after Fitzpatrick had gone out of office.

It appears by the condition of the bond, which is set out on oyer in the subsequent pleadings, that the principal obligor was brought before one Kemball, a justice of the peace, charged with being the father of a bastard child, born of one Mary Shea, and said justice being of opinion that the offence should be farther inquired of, it was thereupon stipulated in the said condition, "that if the said Henry Hoskins should make his personal appearance at the next term of the County Court to be holden for Mobile county, on the 2d Monday in February, 1845, then and there to be dealt with as the law directs, and shall abide the order and judgment of said court and not depart without license, and shall, in the mean time, keep the peace towards all persons, and especially towards Mary Shea, then the bond to be void," &c.

The record shows a demurrer to the declaration, but it does not appear what disposition was made of it. It however appears that the plaintiff below filed his demurrers to several pleas of the defendant, and according to the settled practice, this opened the pleading, and the demurrer reaches back to the declaration.

The view we take of this case renders it unnecessary that we should examine but the question, whether the action was properly brought in the name of Benjamin Fitzpatrick? The statute (Clay's Dig. 134, § 2,) which requires the justice of the peace, if sufficient cause appears, upon a preliminary examination of the female, touching the paternity of the child born or to be born of her, to bind the supposed father in a bond with good security, to be and appear at the next County Court to be holden for the county, and in the meantime to keep the peace, &c., does not designate the person to whom the bond shall be made payable, nor does it provide how it shall be proceeded upon in case of forfeiture. It was, however, decided at an early day, that such

bond should be made payable to the Governor, (Lake v. The Governor, 2 Stew. 395,) and we are of the opinion that the decision in that case should be adhered to upon that point. But the question arises, how shall the parties be proceeded against upon the bond for a breach of its condition?

It has been held, that official bonds payable to the Governor *eo nomine*, and his successors in office, are, in legal effect, obligations to the Governor as the chief executive officer of the State, and may be sued and declared on without noticing the obligee's name; and that where a suit is brought in the obligee's name, (describing him officially,) who was superseded in office before its commencement, it will be regarded as an action by the Governor, and the name of the individual will be regarded as surplusage.—Bagby, Governor, use &c. v. Chandler & Chandler, 8 Ala. 230. Now we are not disposed to question the propriety of this decision, in holding that the name of the individual suing may be regarded as surplusage, in cases where the suit is brought for the use of a third party who has the right to put the bond in suit, to recover damages as a compensation for some official malversation, which has injuriously affected him; but we do not feel authorized, upon established legal principle or precedent, to hold that when no one appears on the record as the beneficiary or *usee*, any one may put the bond in suit, describing himself as Governor, and recover, upon the ground that the Governor, and not the individual, is suing. In such cases as this, which are not brought for the use of any one, some one having by law authority to move in the matter of recovering upon the bond, must appear upon the record. We may concede that the suit may be brought, describing the plaintiff—"The Governor of the State of Alabama"—or in the name of the individual who for the time being may fill the office, describing him as such Governor, and averring that he is the successor, &c. of the obligee, which would certainly be the more regular mode of conducting the action; but where one, who, at the time the suit was commenced was not Governor, sues for the use of no one, how can we judicially know that the suit is not in the individual right of the party who describes himself as Governor. Ordinarily, the addition of "Governor, &c.," would be regarded as descriptive of the person, and the description, instead of the name of the person, might be rejected as surplusage.

We are willing to adhere to the former decisions, to the extent to which they have gone, but are unwilling to extend them to cases where it does not appear that the person suing as Governor is a mere nominal party, suing for the use of some one named upon the record. Where a named individual is a party, describing himself by a wrong designation, as Governor, without suing for the use of some one else, the result must be to have no one responsible for the cost. It is not a suit by the State, nor yet, if the construction contended for be the correct one, is it a suit by an individual, but a nondescript, for which neither the statute nor the common law makes provision.

We conclude, therefore, that it is not competent for one to sue upon such bonds, describing himself as Governor, when in fact he was not, at the time the suit was instituted, the Governor of the State, unless the suit is brought for the use of some one, who under the statute would be responsible for the cost and entitled to the recovery. The declaration being defective, the demurrer should have been visited upon it.

Let the judgment be reversed and the cause remanded.

YARBROUGH *vs.* HUDSON.

1. A recital in the bill of exceptions that the defendant offered evidence to which "the plaintiff objected, but his objection was overruled and plaintiff excepted," sufficiently shows that the evidence was actually given to the jury.
2. In an action for maliciously suing out an attachment, evidence that another attachment against the plaintiff was in the hands of the sheriff and was levied on the same property at the same time that the defendant's was levied, is inadmissible for the defendant.
3. But the defendant may prove the issuance of another attachment and *notice thereof to himself* previous to the issuance of his own attachment, as tending to rebut the presumption of malice.
4. A deed of trust executed by the plaintiff prior to the issuance of the attachment is admissible evidence for the defendant in such an action; and also any proof tending to show that it was fraudulent; or

that it was part of a plan to enable the plaintiff to dispose of his property fraudulently; or that he was in embarrassed circumstances at the time of its execution; or that the property conveyed by it was subsequently run off by the beneficiary to another State.

5. The contents of a bill of sale cannot be proved by parol until the instrument itself is produced or its absence accounted for.

6. Previous to the Act of 1850, (Pamphlet Acts, 45) an attachment could not be sued out on account of a fraudulent disposition of his property by the defendant, consummated prior to the issuance of the attachment.

ERROR to the Circuit Court of Talladega. Tried before the Hon. E. Pickens.

THIS was an action to recover damages for the wrongful and vexatious suing out of an attachment by Hudson against Yarbrough. The attachment was issued on 2d February, 1848. At the trial the defendant offered in evidence, after proving its execution, a deed of trust executed by plaintiff, dated January 18, 1848, to secure a debt due to his brother, L. Yarbrough. The plaintiff objected to its introduction, but the court admitted it. "The defendant offered to prove by one Wilson, that L. Yarbrough, the beneficiary in the deed, in November, after its execution, went to the house of witness and wanted witness to give up to him some of the negroes which had been conveyed in the deed of trust and which witness had in his possession, and said he had a bill of sale for them from the plaintiff." The plaintiff objected to this evidence, but the court admitted it. The other evidence in the case may be gathered from the opinion of the court.

WOODWARD, for plaintiff in error.

RICE & MORGAN, *contra*.

COLEMAN, J.—The suit was brought in this case to recover damages for the alleged wrongful and malicious suing out of an attachment.

The bill of exceptions contains this statement: "The defendant offered to prove by the sheriff that another attachment against the plaintiff was in his hands at the same time that he levied Hudson's, (the defendant,) in favor of Hardie & Co.,

which was also levied on the same property. Plaintiff objected, but his objection was overruled and plaintiff excepted." The defendant insists that we should not notice this exception, because it does not appear that the evidence objected to was actually given to the jury. We think that a reasonable construction of the bill of exceptions authorizes the conclusion that the testimony was given to the jury. If the defendant did not introduce the evidence after the court permitted it, we see no possible reason for the plaintiff's tendering or the court's signing the bill of exceptions. We think the court erred in permitting proof of the levy of the other attachment on the same property; we cannot perceive how it was pertinent proof under the issue. To show that others were liable as well as the defendant, would not lessen the damages for which he might be liable. We think it was competent for the defendant to show the issuance of Hardie & Co.'s attachment and *notice* thereof to him, previous to the issuance of his own, as tending to rebut the presumption of malice. If it appeared that the defendant acted on the information of others, such as the affidavit in Hardie & Co.'s case might afford, it was a circumstance going to show that he acted without malice.—Chandler v. McPherson, 11 Ala. 916.

We think it was clearly proper to introduce the deed in evidence and also any proof going to show that it was fraudulent, such as the evidence that it contained all plaintiff's property. The several judgments mentioned in the bill of exceptions were also competent evidence, as going to show the embarrassed condition of the plaintiff, and a motive for fraudulently disposing of his property. Although the deed was made some time previous to the issuance of the attachment, it authorizes conditionally a further sale of the property which had been left in the possession of the plaintiff. The deed may have been part only of a plan to enable the plaintiff thereafter to dispose of his property fraudulently, &c. It was competent to show the subsequent running off of the property to Georgia, and that it was in the possession of Littleton Yarbrough, the beneficiary in the deed, as circumstantial evidence going to show that the execution of the deed was not intended as the only act to be done towards the fraudulent disposition of the property.

The declaration of Littleton Yarbrough as to the bill of sale, (as proven by the witness Wilson,) was inadmissible. Yar-

brough was a competent witness, and the bill of sale ought to have been produced or its absence accounted for before evidence of its contents could be given.

The plaintiff asked the judge to charge, "that if the deed in trust had been executed previous to the issuance of the attachment, and no other act intended to be done by the plaintiff in purpose of fraud, then as the act had been consummated, the after suing out of the attachment would be wrongful." The judge declined so to charge, but charged "that if the deed had been recently executed, and only heard of by the defendant shortly before the attachment, the fact that it may have been consummated and nothing more intended, would not make the issuance of the attachment wrongful."

At the date of this attachment the statute authorized the issuance thereof, when affidavit should be made "that the party is about to dispose of his property fraudulently, with the intent to evade the payment of the debt sued for." It is obvious, therefore, that a fraudulent disposition of the party's property, consummated previous to the issuance of the attachment, did not justify the suing out of the same, and that the court erred in ruling to the contrary.

Let the judgment be reversed and the cause remanded.

WATTS *vs.* STEELE, TRUSTEE.

1. A father, who by reason of his poverty and bodily infirmity has become unable to support his infant daughter, has a right to resort to the court of equity which has appointed a trustee of her estate, to have an allowance for her support and education decreed to be paid by such trustee out of the annual income of her estate.
2. The infant is not an indispensable party to a bill filed by her father against the trustee of her estate, to have an allowance for her support and education decreed to be paid by the trustee out of her annual income.

ERROR to the Chancery Court of the Second District, holden at Monroeville. Tried before the Hon. J. W. Lesesne.

WATTS, JUDGE & JACKSON, for plaintiff in error:

1. Where a father has not the means or ability to maintain and educate his child, and when such child has a large separate estate, yielding a handsome income, a portion of that income should be allowed to the father to pay the expenses of educating the child.—2 Story's Eq. Juris. § 1354, 1354 (*a*); 3 Dan. Ch. Pr. 2088-9-90 and note 3; McPherson on Infants, Law Lib. vol. 16, p. 146-50; Wilkes & Wife v. Rogers et al., 6 John. 566; 5 Vesey, jr., 194; Stewart, guardian, v. Lewis, 16 Ala. 734.

2. The infant need not necessarily be made a party in this proceeding for an allowance, the father having the custody of the person of the child, was the proper party to file the bill.—6 Paige Ch. R. 136; McPherson on Infants, (16 Law Library) marg. p. 218.

No counsel for defendant.

CHILTON, J.—The question in this case is, whether a father who by reason of his poverty and bodily infirmity has become unable to support his infant daughter, has a right to resort to the court of equity which has appointed a trustee for the estate of the daughter, to have an allowance for her support and education decreed to be paid by such trustee out of the yearly income of her estate. The bill is filed by the father, with whom the daughter lives, (the mother being dead,) against the trustee. The chancellor dismissed the bill.

We are unable to see any reason why the court should repudiate this jurisdiction over the infant and her estate. There is nothing in the nature of the settlement by which the property was secured to the mother of the daughter, forbidding an allowance for maintenance. The ward has an absolute interest, and the rule is, that where funds are thus situated, the court will allow maintenance in the absence of any direction to that effect, and even in disregard of a direction for accumulation; and if an insufficient sum is given for maintenance, the court will increase it.—McPher. on Inf. 241.

As it is the duty of the father to maintain his child when he

can do so, he is held liable to account as guardian for the profits of the child's estate which come to his possession during the child's minority. Such being his duty, the courts of chancery originally refused to allow any re-imbursement to the father for past maintenance.—Hughes v. Hughes, 1 Bro. C. C. 387; 2 ib. 231; 3 ib. 60; Reeves v. Prymer, 6 Ves. 424; McP. on Inf. 247, where the cases are collated. But it is said that in special cases, the court may direct an inquiry in favor of the father for past maintenance. He cannot insist on it as a matter of course.—*Ex parte* Bond, 2 M. & K. 439.

The case before us is for future maintenance and education of the daughter. There can be no question as to the jurisdiction of the chancellor in setting apart a fund for this purpose out of the income of the daughter's estate, if the father be unable to provide for her. When the father is utterly unable to support his children, the law would be inhuman in the extreme to cast them upon the charity of strangers for support, while their own property is adequate for their maintenance. But such provision does not depend upon the father's insolvency only, but is made whenever he is unable to give the child an education suited to the fortune which she enjoys or expects.—Buckworth v. Buckworth, 1 Cox 80, cited in McPh. on Inf. 220. It is said the father's ability is to be estimated comparatively. The amount of his income, the size of the family dependent on him for support, and we might add, his physical inability from disease, &c., to exert himself in providing for them, should be taken into the estimate; and if, in view of the circumstances, it should appear to be reasonable to make an allowance, and for the benefit of the infant, the court should order it. And to this end, it is proper that the question of the ability of the father, the amount of the ward's income, and the sum required for her support and education, should be referred to the master, if the chancellor is in doubt upon these questions, so that the proper allowance can be made.

We do not think there is any valid objection on the score of parties. The father is a party interested in being provided as the guardian by nature and nurture, with the means of supporting and educating his child, and is certainly the proper person to superintend her education, unless there be objections to him, and none are pretended to exist in the present case. The trustee who holds the property represents the ward in respect to

that. It is not indispensable that the child should be made a party. The court will see to it that her interest is not prejudiced. We find a similar application was heard at the suit of the mether, and a liberal allowance made, in South Carolina, (Mrs. Heyward v. Cuthbert, Ex'r. of Heyward, 4 Des. Eq. R. 445,) and the principle seems to be sanctioned by several authorities in the brief of counsel.

Let the decree be reversed and the cause remanded.

DOUGLASS & EASTON *vs.* THE BRANCH BANK AT MOBILE.

1. In an action on a lease for years to recover the rent thereby reserved, it is not necessary to aver in the declaration that the defendant entered upon or took possession of the premises.
2. A stranger cannot sue upon a deed which only contains covenants between the parties, although it may contain an express covenant for his benefit.
3. When a corporation is a party to a deed, a mistake in setting out its name will not vitiate the deed, if it is apparent from the face of it that the corporation was intended thereby.
4. The courts in this State are bound to take judicial notice that the assets of the State Bank and Branches are placed in the hands of commissioners who are authorized to sell or lease its real estate, and to appoint assistant commissioners to aid in the adjustment and settlement of its affairs.
5. When a lease of real estate belonging to the Bank is executed in the name of the assistant commissioner, and the rent due thereby is to be paid to the Bank, equity will decree a reformation of the contract and a specific performance against the Bank.
6. The Bank may sue in its own name on a lease of its real estate when by the terms of the lease the rent is reserved to it, although the demise is in the name of the assistant commissioner.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

THIS was an action of covenant on a lease of real estate belonging to the Bank, to recover the rent thereby reserved. Judgment by default was taken against the defendants.

STEWART, for plaintiffs in error:

The appellants contend—1. That the declaration is insufficient to support the judgment. It contains no averment of performance by the plaintiff; no averment of the delivery of possession of the demised premises to defendants, nor of their entry, nor enjoyment of the use of the property. The lease was prospective, and was to commence after the date of the indenture. The obligation to pay rent depends on the use and enjoyment.—See the forms of declarations on covenant for rent, or debt. This averment is always made.—See Arch. on Land. & Tenant, 146; 53 Law Lib. 148-141.

2. The declaration sets forth a lease made by the defendant, in which the plaintiff contracts by the name and description of Henry B. Holcombe, assistant comm'r of the Branch Bank of the State of Alabama at Mobile. This shows a lease made by Holcombe, and would support an action by Holcombe, but not by the Bank. The Bank has no authority by law to use any other name than its corporate one to make contracts.

An obligation to a corporation, in which the corporation is misdescribed, may be helped by averment, but only where the misdescription is such that the corporation can still be recognized and distinguished from all others; but not where a covenant is to another party or person. The deed cannot be contradicted.

The legal effect of this lease is to create a right and obligation in Henry B. Holcombe and his executors, &c., individually; the addition to his name is mere description of person, &c.—Culpepper Society v. Digges, 6 Rand. 165; Mayor & Burgesses Lynne, 10 Coke's R. vol. 5, 122-25; Ang. on Corp. 170-1; Tileston v. Newell, 13 Mass. 406; Taft v. Brewster et al. 9 Johns. 334.

No counsel for defendant.

D'ARGAN, C. J.—The first objection to the declaration is, that it does not aver that the defendants entered upon or took possession of the land. The precedents, it is true, all contain this averment; but I have found no case that holds such an averment indispensably necessary, except in the case of a tenancy at

will. In actions on leases for years, the declaration is good without the averment that the defendant entered upon or took possession of the land. The reason of this distinction is, that in the latter case, the rent is due by the contract, but in the former it is due by the occupation. In cases of leases for years, the tenant has the right to enter by virtue of his contract, and the law will presume that he exercised that right, or could have done so at his pleasure. He must therefore pay rent, unless he can show that he was prevented from taking possession by some act or fault of the lessor.—1 Saun. 203, Note 1; Bellasis v. Burbrick, 1 Salk. 208; 2 Chitty, 551, Note.

The next objection is, that the declaration shows a lease from Henry B. Holcombe to the defendants, and a covenant on their part to pay rent to the plaintiff; consequently that the suit should have been in the name of Holcombe, and not in the name of the Bank. The substance of the allegation is, that the defendants covenanted with the plaintiff in the name and by the description of Henry B. Holcombe, assistant commissioner of the Branch of the Bank of the State of Alabama at Mobile, whereby the said plaintiff demised, &c., the defendants agreeing to pay therefor to the plaintiff the sum of four hundred dollars, &c. The judgment was by default, and the question is whether according to this averment the plaintiffs have the legal right to sue for the rent. I admit the rule to be, that when a deed is *inter partes*, a stranger to the deed cannot sue upon it, although it contain an express covenant for his benefit. Thus, if A. of the one part and B. of the other, enter into a covenant, and B. binds himself to do something for C.'s benefit; C., not being a party to the instrument, cannot sue in his own name on this covenant, although he is to be exclusively benefitted by its performance. Chitty's Pl. 2-3, and cases there cited; 3 Bos. & Pull. 149, Note A. But I cannot believe that we should, according to this declaration, construe the covenant to be between Holcombe and the defendants, with an undertaking on their part to pay rent to the plaintiff; on the contrary, the covenant is alleged to be the act of the plaintiff, in the name of Henry B. Holcombe, assistant commissioner of the Bank, and the rent is to be paid to the plaintiff. This, at the most, can be said to be only a misnomer of the corporation in the contract of lease. Can the defendants avail themselves of it to avoid their contract? The authorities

all agree in this, that slight mistakes in the name of corporations will not avoid their deeds or grants.—See the cases of The Mayor & Burgesses of Lynne, 10 Coke, vol. 5, 122-25; Angell on Corp. 170-71, and cases there cited. And in the case of The Culpepper Society v. Digges, 6 Rand. 165, it was said, that mistakes in the letters or syllables of the name of the corporation shall not vitiate the deed. I am not able to extract any other principle from these cases than this, if it be apparent upon the face of the deed that the corporation was intended thereby, either to take or to grant, a mistake in the true name will not vitiate the instrument. Thus, in the case of The President, Managers & Company of the Berks & Dauphin Turn. Road v. Myers, 6 S. & R. 12, the instrument produced on trial contained a covenant with the Berks & Dauphin Turn. Company. C. J. Gibson said, "I take the law of the present day to be, that a departure from the strict style of the corporation will not avoid its contracts, if it substantially appear that the particular corporation was intended; and a latent ambiguity may, under proper averments, be explained by parol evidence in this, as in other cases, to show the intention." Again, in the case of The New York African Society for Mutual Relief v. Varick, 13 Johns. 38, the count stated, that the defendants by their certain writing obligatory acknowledged themselves held and firmly bound unto the plaintiffs, by the description of The Standing Committee of the New York African Society for Mutual Relief. To this declaration there was a demurrer, which was overruled, on the ground that the obligation was to the corporation, *though by an improper name.* These authorities, I think, establish the principle I have stated, that if it appear from the deed itself that the corporation was intended, then its misdescription will not avoid it. According to this declaration, the lease is under the corporate seal of the Bank, and the money is to be paid to the Bank; but the demise is in the name of Henry B. Holcombe, assistant commissioner. We are bound to know, that by law the assets of this Bank are placed in the hands of commissioners who are authorized to sell or lease its real estate, and who have authority to appoint an assistant commissioner to aid in the settlement and adjustment of its affairs; and taking into consideration these facts, which we must know as matter of law, I think it sufficiently appears that the Bank was intended to be bound by the lease. I,

however, will not rest my judgment solely on that ground, for there is another which is more satisfactory. The demise is alleged to have made been by the plaintiff, in the name of Holcombe, assistant commissioner of the Bank; the *solvendum* is alleged to be to the plaintiff, that is, to the Branch of the Bank of the State of Alabama at Mobile. Now, if it were admitted that the lease could not bind the plaintiff at law, yet I entertain no doubt but it could be reformed in equity and the plaintiff decreed specifically to perform the contract. Then the rent being reserved to the plaintiff by its proper name, there can be no reason why the suit should not be sustained in the name of the Bank, for its recovery.

We have looked into the supposed irregularity in the rendition of the judgment, but we discover none that can avail the plaintiffs in error.

Let the judgment be affirmed.

GILLIS, USE, &c. *vs.* HOLLY.

1. The attorney of the successful party is entitled to the tax fee in a suit, and not the party himself.

ERROR to the Circuit Court of Covington. Tried before the Hon. E. Pickens.

THIS was an action of assumpsit by the plaintiff in error against the defendant, to recover on the common counts, for services rendered as an attorney and counsellor at law. The plaintiff's witnesses testified that his services were worth one hundred dollars, exclusive of the tax fees, which amounted to one hundred and thirty-five, and which the plaintiff had received. The court charged the jury, that the tax fee allowed in a suit does not belong to the attorney in the case, but to the successful party, and that the attorney has no right to receive it and appropriate it to his own use without the consent of his client. The plaintiff excepted to this charge, and now assigns it as error.

WATTS, JUDGE & JACKSON, for plaintiff in error.

HENRY, *contra.*

COLEMAN, J.—The question raised for our decision in this case is, who is entitled to the fee, usually called the tax fee, collected of the unsuccessful party on the final decision of a cause in a court of record.

The act of 1812 declares, "that the clerks, sheriffs and other officers and persons hereinafter named, shall be entitled to demand and receive for the services hereinafter mentioned, the fees thereto respectively annexed," &c., and in the same act counsellors and attorneys at law are allowed the fees therein named for prosecuting or defending suits.

By the act of 1815, it is declared "that the party prevailing in any suit, which may be brought in any of the courts of this State, shall be considered as entitled to the tax fee allowed the attorney, and recover the same against the party cast in the suit."

There was no provision in the first act, saying from whom and in whose name the attorney's fees should be collected, and we think the last act was intended to remedy this defect and not repeal the first act. If there was any doubt about this construction of the acts, we ought, certainly, to consider it as fully settled by the continued practice of the courts of this State for the last thirty years, to give the tax fees to the attorney, and not to the client.

The court below erred in ruling to the contrary, and the judgment must be reversed and the cause remanded.

SALTMARSH *vs.* BIRD, ADM'R.

1. When a claim against an insolvent estate has been rejected by the Judge of the Orphans' Court, the claim cannot be re-investigated by the succeeding Judge of Probate, if any of the creditors object.
2. A judgment cannot be amended *nunc pro tunc*, at a subsequent term, unless there is some matter of record to amend by.
3. The refusal of a Judge of Probate to admit a person claiming to be a creditor of an insolvent estate, to renew the litigation after a final judgment rejecting his claim, is not such a judgment as will authorize a writ of error.

ERROR to the Court of Probate of Mobile County.

THE plaintiff in error filed in the Orphans' Court a claim against the estate of Thomas Casey, deceased, which had been declared insolvent, but the claim on final hearing was rejected by the court. At a subsequent term of the Court of Probate, the plaintiff moved the court for an allowance of his claim and his distributive share of the estate, but on the objection of some of the creditors, the claim was again rejected. It appears from the bill of exceptions that this motion was predicated on a memorandum on the back of the claim in the handwriting of the Judge of the Orphans' Court, showing that it had been rejected because the affidavit of the claimant was made before a justice of the peace, and the plaintiff moved to amend the former judgment *nunc pro tunc* from this memorandum, so as to make the record show the reason of the rejection of his claim, which motion the court refused and the plaintiff excepted.

HAMILTON, for plaintiff in error.

JONES, *contra.*

CHILTON, J.—A final judgment rejecting the claim of the plaintiff in error having been rendered by the Orphans' Court, it was not competent for the Probate Judge who succeeded to the powers of the Orphans' Court Judge, to treat the decree of his predecessor as a nullity, and re-investigate the claim, if any of the creditors objected; for they, and not the administrator, were the persons whose interest was to be affected by its allowance,

the estate being insolvent. We must presume the record of the former judgment correctly sets forth what was considered and decided by the court. This rejects the claim *in limine*, and it was not competent for the judge at a subsequent term, from the memoranda in the handwriting of Judge Cuthbert, endorsed on the back of the note, to interpolate by amendment *nunc pro tunc* the reason for the former judgment, so as to destroy its effect as a bar. If such amendment were allowable in any case, it is well settled there must be some matter of record to amend by, and here none exists. The plaintiff in error had no standing in the court below, and the refusal of the court to admit him to renew the litigation after a final judgment rejecting his claim, is not such a judgment as authorizes a writ of error. The writ must consequently be dismissed.

GARDNER ET AL. *vs.* GANTT ET AL.

1. The distributees or next of kin can maintain no suit either at law or in equity, for the mere purpose of distribution, until letters of administration have been granted on the estate of the decedent.
2. The statutes of this State have changed the common law with respect to the rights of executors, and an executor here is not entitled to exercise any power as such, until he has been duly qualified in the manner pointed out by the statutes.
3. Hence, if an executor assents to a legacy before letters testamentary have issued to him, his assent will not pass the legal title, nor bind the estate which he represents.

ERROR to the Chancery Court of Dallas. Tried before the Hon. W. W. Mason.

THE bill alleges that Robert Gantt, the father of complainants, duly executed his last will and testament, which, after his death, was admitted to probate in the proper county. By said will the testator bequeathed certain slaves to his wife during her life or widowhood, with remainder to complainants. The widow sold, and otherwise disposed of, the slaves, and some of them

are alleged to be in the possession of Gardner, who is made a defendant. The bill also alleges the death of the widow, and that all the debts against the decedent were fully paid. The chancellor sustained bill, and granted the relief prayed, and the defendants are now plaintiffs in error.

LAPSLEY & HUNTER, for plaintiffs in error:

1. The legatees or distributees of Robert Gantt cannot maintain this suit. His administrator is the only proper party complainant.—Farley v. Farley, 1 McCord's Ch. R. 506; Hall v. Andrews, 17 Ala. 40; Kelly v. Kelly, 9 ib. 908; Upchurch v. Nosworthy, 12 ib. 532; Cleveland v. Chandler, 3 Stew. 489; 2 Williams on Executors, 843.

2. A decree in this case would be no protection to the defendants against another suit by the administrator, in whom the legal title is vested. The averment that there are no outstanding debts cannot cure the defect, for the defendants here are not the proper parties to contest that.

WILLIAMS & CAMPBELL, *contra:*

1. The rule that an executor must assent to a legacy is intended for the protection of the executor himself and the creditors of the estate. But in this case the debts are shown to be paid, and there is no use for an administration, unless for the purpose of making distribution; and that is also unnecessary, because distribution is made by the will itself. In Andrews v. Hunneman, (6 Pick. R. 126,) it is laid down that a legatee cannot maintain an action for a legacy, until it appears that there are assets sufficient to pay the debts, unless the executor assents to the legacy. The plain inference from this is, that when it is affirmatively shown that the assets are sufficient to pay the debts, an action may be maintained, although the executor does not assent to the legacy. Even if it were true that an executor can maintain trespass or trover against a legatee, who takes or retains property specially bequeathed to him, without the executor's assent, it does not follow that any one else can make the same objection. The cases of Upchurch v. Norsworthy, 12 Ala. 532, and Farley v. Farley, 1 McCord's Ch. R. 506, were contests between the legatee and the personal representative.

2. The assent of the executor will be presumed from circumstances, because the law will presume that he has done his duty;

as when an executor dies after the debts are paid, but before the legacies are satisfied; or when a legatee possesses himself of the property, and retains it without complaint from the executor.—2 Williams on Executors, 1180. A person who is appointed executor may assent to a legacy before he proves the will.—1 ib. 240; 2 ib. 1182. Even if he should afterwards die without proving the will, his assent will be effectual.—1 ib. 241; 8 Sim. 67. Assent will be presumed from long acquiescence, or from any other act in the course of administration from which it may be inferred.—2 Williams on Ex. 1183-4. In this case the executrix took possession of the property, and enjoyed the life estate. Acquiescence by the executor in the possession of one who has a specific legacy at the testator's death vests the legacy without a formal assent, if the assets are sufficient for the payment of the debts.—See 6 Pick. R. 126; 2 Hill's (S. C.) R. 522; 1 Dev. & Bat. 72. In this case some of the legatees had possession before the death of the executrix, and this is sufficient evidence of assent.

3. Was the widow in fact so far executrix as to enable her to give an assent that would be binding? She did not disclaim or renounce the trust, but simply failed to qualify. With respect to the acts which will be sufficient to compel the executor to take probate, the authorities lay down two general rules: 1. Whatever acts show an intention on his part to take upon himself the executorship will amount to an administration. 2. Whatever acts will make a man executor *de son tort*, will also be deemed an election of the executorship.—1 Will. on Ex. 228. If the executrix acted in such a way that a court of chancery would compel her to execute the will, then will her assent be presumed for the protection of the legatees.

DARGAN, C. J.—The distributees or next of kin can maintain no suit, either at law or in equity, for the mere purpose of distribution, until letters of administration have been duly granted upon the estate of the deceased. This principle is well settled by authority, but even without decided cases, no other rule could obtain, for the reason that the law casts the title to all the personal estate of the decedent upon his personal representative. It is true that he holds the title as trustee to pay the debts, in the first instance, and then to make distribution according to the

statute amongst those entitled. But until letters of administration have been granted, the legal title cannot be brought before the court, and therefore it cannot be bound by a decree; nor can the court see that the trusts have been executed. For instance, if the next of kin should file their bill for distribution and a decree should be rendered, it could not bind the administrator who might be afterwards appointed; nor would such a decree afford the slightest protection to those against whom it might be rendered, as against the claims of the administrator. In the case of Bradford v. Felder, (2 McCord's Ch. R. 168,) the question was, whether the next of kin could file a bill in equity for the recovery of property, no administration having been granted on the estate of the deceased. The Court of Appeals of South Carolina held that they could not. In the case of Taylor v. Brooks (3 Dev. & Bat. 139,) the question was, whether the next of kin, before final distribution, could maintain detinue for a slave, the administrator having died before the full and complete administration of the estate. The Supreme Court of North Carolina held that they could not. In the case of Alexander v. Stewart et al., (8 Gill & John. 226,) the question was, whether property remaining in specie, and which was left unadministered by the executor who had died, could be recovered by the distributees by bill in equity, it appearing that there were no debts against the estate of the testator. The Court of Appeals of Maryland held that it could not.

With these decisions I am entirely satisfied; for it is the object of all courts, especially courts of equity, to put an end to litigation, and to protect those who may be compelled to obey their decrees; but if the legal title is not before the court, *no decree can be rendered* that will bind it, nor will the performance of the decree by the defendant afford him any protection. Instead, therefore, of ending litigation and binding the rights of the parties, if courts of equity were to proceed at the suit of the distributees, without having the title of the administrator before them, their judgments might become the sources of litigation and injustice.

But it is argued that this rule will not apply to legatees, although no letters testamentary have been granted to the executor, nor letters of administration with the will annexed to any other person, because the executor may assent to the legacy be-

fore the probate of the will or the grant of letters testamentary to him, and that this assent will give the legatee a perfect title to the legacy, and he may sue in respect to it, either at law or in equity, as the case may require. In England it is true that the executor derives his title and authority from the will, and therefore if he assent to a legacy even before probate, and should die without taking out letters testamentary, nevertheless his assent shall stand firm, and the legatee's title will be perfect.—1 Will. on Ex. 160. But in this State it has been long settled, that our statutes have changed the common law in this respect, and the executor here is not entitled to exercise any power as such, until he has been qualified to act in the mode pointed out by the statutes.—Cleavland v. Chandler, 3 Stew. 489. Hence it follows that until letters testamentary have issued to him, he can give no assent to a legacy that will pass the legal title, nor bind the estate which he represents; for his authority is not with us, as in England, derived solely from the will, but from his letters testamentary. Applying these general rules to the bill and the proof, it is clear that the complainants, whatever may be their ultimate rights, cannot recover in this suit.

The bill alleges the making of the will, and shows the character of the legacies. It also is averred that the will was admitted to probate, but the bill does not allege that letters testamentary were ever taken out by the executrix, or that letters of administration were ever granted to any one; nor, indeed, that the executrix ever assented to the legacy. The proof too wholly fails to show that letters testamentary or of administration were ever granted upon the estate of the testator. Under such allegations and proof no relief can be had, for the legal title to the property is not before the court, and no binding decree can be rendered in reference to it. Nor is the view we have taken of this case inconsistent with the case of Vanderveer v. Alston et al. (16 Ala. 494.) In that case the legal title was before the court, and the decree was binding on the administrator as well as the distributees. We are entirely satisfied, that according to the well settled principles of equity, no relief can be granted in this suit, neither according to the bill, nor the proof.

The decree must therefore be reversed and the bill here dismissed; but it will be without prejudice to another suit properly brought.

McCLELLAN *vs.* ALLISON.

1. When a judgment is rendered by a justice of the peace and the case is taken by *certiorari* to the Circuit Court, the *certiorari* should not be dismissed because the penalty of the bond is less than the amount prescribed by the order of the judge by whom the writ was granted.

ERROR to the Circuit Court of Talladega. Tried before the Hon. Nathan Cook.

WOODWARD, for plaintiff in error.

SHELLY, *contra.*

COLEMAN, J.—Allison recovered a judgment against McClellan, before a justice of the peace, and the latter carried the case by *certiorari* into the Circuit Court. The *certiorari* was dismissed by the court on the motion of Allison, by his counsel, as the judgment recites, "for irregularities."

In Carter v. Pickard, 11 Ala. 673, it was decided that an appeal from a justice of the peace should not be quashed for a defect in the bond, unless the appellant, *upon being required* by the court, fails or refuses to execute a perfect one. The only irregularity we have been enabled to detect in the case, is, that the penalty of the bond is for a less amount than was required by the order of the judge granting the *certiorari.* It does not appear that McClellan failed or refused to give a perfect bond, and consequently the court erred in dismissing the case, and the judgment is reversed and the cause remanded.

JONES *vs.* DAWSON *et als.*

1. Expenses properly incurred by a trustee in the execution of his duties as such are a charge or lien upon the trust estate, and the *cestuis que trust*, or their assigns, cannot compel him to convey in equity until his demands against the estate are satisfied.
2. But persons who are employed by the trustee, in and about the business of the trust property, must look to him personally for payment, and cannot proceed directly against the trust fund.

(DARGAN, C. J., dissented from the second point of this case, and adhered to the decision in Coopwood et al. v. Wallace, 12 Ala. 790.)

3. *Cestuis que trust* for life, who are in possession of the trust estate, are liable for all current expenses attending the enjoyment of the property, and such expenses constitute no charge upon the *corpus* of the trust.

ERROR to the Chancery Court of Dallas. Tried before the Hon. W. W. Mason.

THE bill alleges substantially, that Lawrence E. Dawson and Mary W. his wife, executed an ante-nuptial agreement in 1826, in the State of South Carolina where they then resided, by which the property of the wife was conveyed to trustees for the joint use and benefit of the husband and wife during their joint lives, and then for the use and benefit of the survivor during his or her life, with remainder to the issue of the marrriage. The property, however, was not to be subject to the husband's debts, and if any of his creditors attempted to subject it to the satisfaction of their debts, his interest was to cease immediately. The bill further alleges that the control of the trustees was merely nominal, and they permitted Dawson to have the entire management of the whole trust property; that in 1842 Dawson and his wife removed to Alabama, and brought the whole property with them, which they invested in a plantation in Lowndes county, and negroes and other personal property; that Dawson continued to exercise the entire control of the property, and made all contracts relating to its business; that he employed the complainant as overseer of the plantation during the years 1845, 1846 and 1847; that the trustees remained in South Carolina, and in 1847, on the application of Dawson and wife, Dawson and one Hamilton were appointed trustees in their stead by the

Circuit Court of Lowndes county. The death of Dawson and the insolvency of Hamilton are also averred. It is insisted in the bill, either that Dawson had such an interest in the trust property under the deed as authorized him to employ persons to perform services necessary for the protection and interest of the estate, or that he was the agent of the trustees. Mrs. Dawson and her three children, the issue of the marriage, are made defendants, and the prayer of the bill is that the complainant's demand for services rendered as overseer may be declared a charge on the trust estate, and the trust property condemned for the satisfaction thereof, and for this purpose that a portion of the property may either be sold, or placed in the hands of a receiver and the rents and profits applied to its satisfaction. It is unnecessary to notice the answers or evidence, as the bill was dismissed for want of equity.

The death of Mrs. Dawson does not anywhere appear in the record, but it was admitted by the counsel who argued the case in the appellate court that she died *pendente lite.*

Lapsley & Hunter, for plaintiff in error:

1. The liability of the trust property to these debts in equity must be determined by the laws of Alabama, there being no proof on that point as to the law of South Carolina.—Bender v. Reynolds, 12 Ala. 446; Inge v. Murphy, 10 ib. 885.

2. Complainants have no remedy at law. Dawson, the husband, had no interest in the trust property subject to execution; besides, he was insolvent, without property, and so died.

3. It is clear that there was no such contracting of these debts by the husband and father, (who was the sole agent,) upon his own exclusive credit, as would preclude recourse on the trust property.—See 2 Smith's Lead. Cases, 212, m.; Ib. 296, T, and Notes of Hare & Wall. to the last case; Raymond v. Crown & Eagle Mills, 2 Mete. 319; Upton v. Gray, 2 Greenl. R. 384; Thompson v. Davenport, 9 Barn. & Cress. 78; Coopwood v. Wallace, 12 Ala. 791; Cleveland v. Walker, 11 ib. 1058.

4. Both on principle and authority, it is clear that the trust property is liable for these debts.—Clancy on Rights, &c., from p. 331 to 337; Bell on Hus. & Wife, 513 to 522; 2 Story's Eq. Ju., from 1396 to 1492; Jaques v. Methodist Church, 17 Johns. 548; Dyett v. N. A. Coal Co., 20 Wend. 570; Davis v. May-

nard, 9 Mass. 242; Dunham v. Day, 15 Johns. 555; Story on Ag. 126, § 162, and Notes; Clark's Ex'r v. Ramsoyk, 9 Cranch, 153; Greening v. Sheffield, Minor R. 276; McEldery v. McKinzie, 2 Por. 33; Forest & Wife v. Robinson, 4 ib. 44; Sadler v. Houston, 4 ib. 204; Hoot v. Sorell, 11 Ala. 386; Coopwood v. Wallace, 12 ib. 791; Cruchfield v. Haynes, 14 ib. 49; Montandin & Co. v. Deas, 14 ib. 33; Bradford v. Greenway, 17 ib. 797; 2 Sup. U. S. Dig. 484, § 206; Bracken v. March, 4 Miss. 74.

Gayle & Evans, *contra:*

1. The construction and interpretation of a contract, as well as its validity, must be governed by the law of the place where it was made.—10 Ala. 885; 17 ib. 636. And the modification of the common law by the judicial decisions of a sister State may be proved by the reports of adjudicated cases, and by the testimony of men learned in her laws.—10 ib. 885.

2. A married woman cannot charge her separate estate with the payment of debts, even if contracted for the use of herself and of her separate property, unless in the mode prescribed in the settlement.—7 Paige, 9; 2 Strob. Eq. 235; 3 Eq. (S. C.) R. 455; 3 Richardson, 463; 17 Ala. 636; 12 ib. 798; 2 Story's Eq. Ju., § 1401. The cases cited from the South Carolina Reports are proof of themselves of the laws of that State.

3. The wife's separate estate generally is not liable for the expenses of herself and family. The husband, if able, is bound to support his family, and if debts are contracted by him for himself and family, and the credit given to him, neither the separate estate of the wife, nor the remainder to the children, is liable for such debts, even though the husband prove insolvent.—2 Hill's Ch. R. 234.

4. Persons who deal with a trustee must do so on his own individual credit, and not on the credit of the trust estate. They are the creditors of the trustee, and not of the estate.—2 Hill's Ch. R. 234. The equity of a creditor to render a trust estate liable for his debt is that he has advanced his money or given his credit to effect the objects of the trusts.—Ib.

5. The terms of the deed vest the use in the husband during coverture.—Bender v. Reynolds, 12 Ala. 446; Ib. 42; Ib. 630.

6. Each estate, or term in the property, must bear its own

charges.—1 Hill's Ch. R. 232. Mrs. Dawson has died since the institution of this suit, and the property has passed under the deed to her children.

CHILTON, J.—We may concede, for the purposes of this decision, that Col. Dawson was the agent of the trustees to take charge of this property, after its removal to this State from South Carolina, and that Mrs. Dawson had bound herself for the payment of the demand due to the plaintiff in error, as wages for overseeing the property for three years, under the contract of employment entered into between him and Dawson; and yet we are of opinion that under the circumstances of this case, as presented by the record, the plaintiff in error is not entitled to the relief which he seeks.

The bill prays that relief may be granted from the *corpus* of the trust; that the property be hired out, or enough of it sold to satisfy the plaintiff's demand. Without stopping to inquire whether the services rendered by the plaintiff in error would, if rendered by the trustees themselves, have constituted a valid charge in their favor against the property, let us inquire, upon the hypothesis that it would, whether the employment by the trustees could confer upon the plaintiff a right to go into a court of equity for satisfaction out of the trust fund. This is a highly important question, and although we do not conceive it one of any difficulty, we have, nevertheless, given it a very mature consideration, both as to the principle upon which it turns, and the authorities in support of the view we have felt constrained to take of it.

We may safely lay it down as the general rule, that expenses properly incurred by a trustee in the execution of his office as such, are treated by the court as a charge or lien upon the estate, and the *cestuis que trust*, or their assigns, cannot compel the trustee to convey in equity without a previous satisfaction of all the trustee's just demands. Does this equitable right extend to the agents of the trustees? In the event of the death or insolvency of such trustee, can those employed by him go immediately upon the trust fund for payment?

In Worrall v. Harford, 8 Ves. 4, the question now under consideration appears for the first, and, so far as I have been enabled to discover, the only time directly presented to the English

Court of Chancery. That was a bill by a solicitor, claiming 80*l.* 9s. 3d., for a balance due to him for services rendered as such, in the matter of the trust estate upon the retainer of the trustees. The plaintiff insisted that his demand should not be considered a simple contract debt, as by the deed creating the trust it was provided, that the trustees should, out of the monies to come to their hands, pay and discharge the expenses of the commission of bankruptcy which was sued out, and all costs and charges of the deed, and also all other incidental charges and expenses relating to the execution of the trusts thereof; and that the trustees should pay and re-imburse themselves all their costs and charges relative thereto; and that therefore his demand ought to be considered as a specialty debt; and that he had a lien on the trust estate for his costs and charges. The bill further charged, that one of the trustees had died, the others had never made a final settlement and dividend of the trust fund, and had refused to pay the plaintiff. The plaintiff prayed to be declared a creditor under the trust deed, for the amount of his bills of fees, and for an account of the trust fund in the hands of the trustees, and that they be decreed to pay the sum demanded to the plaintiff. It was admitted by the counsel on both sides, that this was the first instance of an attempt to assert such an equity. The Lord Chancellor, (Eldon,) after stating that it was admitted that the bill was a perfect novelty, and that it was implied in every instrument creating a trust, that the trustee should be re-imbursed all charges and expenses incurred in the execution of the trust, proceeded to remark, "That it would be strange from that implication to conclude that the persons employed by them are therefore creditors of the trust fund. I doubt very much," says he, "and desire not to be understood to admit, that, even if the trustees are charged not to be solvent, those persons may come upon the trust fund." He concludes by saying, that it did not follow because the trustees were indemnified by the deed from the charges and expenses, that the persons having a personal demand against them for those charges and expenses should be creditors upon the fund; but that such a determination would be most mischievous. This case seems to be regarded by the elementary writers as settling the law upon this point. Mr. Lewin says, "Although the trustees themselves are creditors upon the trust fund for the amount of their expen-

ses, the persons who are employed by them as solicitors, surveyors, &c., have no such lien, except it may be in some special case."—Lewin on Trusts & Trustees, 454-5. The only case cited by the author as an exception to the settled rule, is Lawless v. Shaw, Lloyd & Goold, 154. In that case, however, the testator by his will expressed his particular desire that the plaintiff should be *continued* by his executors and the person who was to be entitled to the perception of the rents and profits of certain real estate, in the receipt and management thereof, and that they should employ and retain him in the receipt, agency and management of all such other lands as should be purchased in pursuance of the provisions of the will, at the usual fees allowed to agents, said Lawless having acted for the testator in that capacity from the time the estate was acquired by him. So that it is manifest, in that case it became a grave question whether Lawless was not entitled to such agency and the consequent fees under the will, which of course would have given him a right to proceed against the fund for compensation, instead of looking to the trustees. The Lord Chancellor of Ireland (Plunket) at first decided that this constituted but a recommendation for the continuance or employment of Lawless, and being precatory, conferred no right upon him, except at the pleasure of the party recommended to employ him.—Lloyd & Gr., 165, N. Upon a re-hearing, Lord Chancellor Sugden made a different decree, (Ib. 170,) but the House of Lords reversed the latter, and decreed in accordance with the views of Lord Plunket.—5 Clark & Finn. 129. So that this case could hardly be regarded as an exception to the rule.

Mr. Lewin, (p. 455,) upon the authority of Lord Eldon, in Worrall v. Harford, *supra*, asserts the proposition broadly, that although there be an express declaration by the settler, *that the trustee shall in the first place pay the expenses of the trust*, and although the trustees themselves be charged to be insolvent, the agent or solicitor of the trustee has no equity as against the trust fund, and that it would be a mischievous principle to hold that every person, with whom the trustees had incurred a just and fair demand, might sue the trustees and come for an account of the whole administration.

Speaking of the lien which the trustee has for expenses incurred upon the trust estate in their hands, Mr. Hill, in his work

on Trustees, (p. 567,) says, "This privilege does not in general extend to solicitors or other persons employed by the trustees; and such persons will be confined to their personal remedy against the trustee by whom they were employed." It appears, however, that any part of the estate which may be actually realized or recovered by the suit in which the solicitor was employed, will be subject to his lien for the costs of the suit.—See also, 10 En. Ch. R. 454; Bozon v. Bolland, 4 M. & Cr. 354; Hall v. Laver, 1 Hare, 578, cited by Hill on Trustees, 567. These authorities may suffice to show that the agent has no equity against the estate, but must go against his employer. But we are told that the case of Coopwood et al. v. Wallace, 12 Ala. 790, is opposed to this view. We have examined that case with much care, and a majority of the court, although very reluctant to depart from decisions which may be supposed to have influenced the institution of subsequent suits analogous to it in their facts, are nevertheless constrained from their views of the law, and the evil consequences to which the doctrine asserted in the second head note of that case would lead, distinctly to declare their disapprobation of it. To hold that persons employed by an administrator or trustee, may, if such trustee is insolvent, proceed at once in equity to recover their fees out of the trust fund or estate, although such fees may not have been allowed the trustee in the settlement, would be most mischievous in its tendency, as involving estates in much embarrassment and cost, requiring as many accountings between the estate and the trustee as there are demands created by him for the supposed benefit of the estate, and which he fails to pay. We say nothing of the right of the party, after he has exhausted his legal remedy against the trustee, to proceed in equity to subject an equitable demand which the trustee may have against the estate. Neither the case of Coopwood v. Wallace, nor the case at bar requires us to express an opinion on this point. All we now decide is, that those employed by the trustee must look to the trustee, and cannot proceed at once against the trust fund for payment. Such expenses must be settled between the estate and the trustee, which settlement, if it must be made in equity, can be effected by *one* suit, whereas the contrary doctrine would exhaust many estates in cost and expenses, in litigating demands asserted against them which require in each case an accounting between the estate and the trustee, so as to eviscerate a fund for their satisfaction.

There are numerous cases of our own court holding that where an administrator makes a contract as administrator, he binds himself and not the estate, when the contract is attempted to be enforced at law, and the judgment, upon a declaration averring that the defendant made the contract *as administrator*, is that the same be levied *de bonis propriis*. How then can the plaintiff proceed in equity upon such judgment against the esate, unless upon the idea of subjecting an equitable demand after exhausting his legal remedy?

2. But if we were mistaken, either in the principle above stated, or in its application to the case made by the record, there is another ground upon which relief must be denied.

The fund, or property against which the bill is aimed, is distinctly asserted to be the *corpus* of the trust. Mr. and Mrs. Dawson had a joint estate for life, his interest, however, to cease when his creditors should attempt to subject his property for his debts. The expense here sought to be charged upon the fund was incurred in the management and employment of the property pending the life estate, and evidently for the benefit of the *cestuis que trust* for life, who reaped the profits which accrued from it. It is well settled in such cases, that the *cestuis que trust* for life, who are in possession of the trust estate, are liable for all current expenses attending the enjoyment of the property, and that such expenses constitute no charge upon the general fund, or *corpus* of the trust.—Hill on Trustees, 571, and cases cited in note L.

Were the law otherwise, the estate in remainder would be utterly destroyed in many cases, for the benefit and protection of those entitled for life. So that conceding this bill to have been properly filed, and that the interest of Mrs. Dawson might have been subjected, yet she having departed this life, as is conceded by the counsel in this court, her interest ceased, and consequently no decree affecting the property can be made. The record does not show that there are any issues or profits due her, and none are sought to be subjected.

It results that the decree of the chancellor was correct, and it is therefore affirmed.

DARGAN, C. J.—I cannot join in overruling the case of Coopwood v. Wallace, (12 Ala. 790.) In that case the admin-

istrators who employed the attorney had resigned, after having come to a final settlement with the Orphans' Court. They were not indebted to the estate, nor had they charged the estate with the fees due the attorney. Under these circumstances, I think it must be admitted, that the estate was ultimately bound for the attorney's fees, and the administrators being insolvent, and without the right then to charge the estate, unless it could be done by bill, I can see no reason why we should not, in that case, let the attorney go directly against the estate. The debt due him the estate owed, not indeed directly to the attorney, but to the administrators who owed the same debt to the attorney. In such a case, when the administrator is removed, and a suit in equity is indispensable to the settlement of the debt, no good reason in my judgment can be given, why we should drive the attorney to a fruitless suit at law, before he can go directly against the estate in the hands of the administrator *de bonis non*.

FREDERICK *vs.* YOUNGBLOOD.

1. When the purchaser of land files a bill seeking to be relieved against the payment of a part of the purchase money on the ground of a deficiency in the quantity of land, and does not allege in his bill that there was any fraud or mistake in the execution of the deed, or that any language not truly expressive of the contract had been inserted therein, or any part of the contract omitted, the deed of conveyance must be taken as conclusive evidence of the terms of the contract.
2. The words "be the same more or less," when used in a deed in stating the quantity of land conveyed by it, mean that the parties shall run the risk of gain or loss, and that if the quantity prove greater or less than that stated, they shall nevertheless abide by their bargain.

ERROR to the Chancery Court of Dallas. Tried before the Hon. W. W. Mason.

LAPSLEY & HUNTER for plaintiff in error.

STONE and JUDGE *contra*.

COLEMAN, J.—The bill in this case alleges that on the 25th December, 1837, the defendant sold to complainant a tract of land at twenty-four dollars per acre; that defendant represented to complainant at the time of sale that the tract contained five hundred and five acres, but that he would estimate it at five hundred acres, which, at twenty-four dollars per acre, made the total consideration of the sale amount to $12,000. One third of this complainant paid in cash, and gave his notes for the balance; that a title to forty acres, part of said tract had been previously vested in complainant, and on the day of sale he received of defendant a deed for four hundred and sixty-five acres, the remainder of the tract; that about —— years after the sale, complainant discovered that there was a deficiency of thirty $\frac{80}{100}$ acres in the quantity of land so conveyed to him; that on the 20th January, 1842, complainant gave his note for a balance due of the purchase money, upon which he has been sued, and prays an injunction for so much as is claimed, for said deficiency.

The defendant denies that he represented the quantity of land as above stated, or that he sold it for twenty-four dollars per acre, and avers that it was a sale in gross for $12,000, and that the deed for said land which describes the same according to the government surveys, and after stating the number of acres, contains the words "be the same more or less," shows truly the agreement between the parties as to the quantity of land sold; that complainant had lived adjoining said land for many years, had owned a part of it and had a better opportunity than defendant of knowing the number of acres. The defendant insists that the complainant has shown so great a want of diligence, in suffering nearly ten years to elapse before he set up the deficiency, that he ought not now to be permitted to do it, &c.

We think the testimony authorizes the conclusion, that at the sale of said land, the parties supposed there were five hundred acres in the tract, and that they rated the same at twenty-four dollars per acre, but that there was no stipulation on the part of the defendant as to the quantity of the land. The deed of conveyance in this case must be taken as conclusive evidence of the terms of the sale. There is no allegation of fraud, or that any language not truly expressive of the contract had been inserted in the deed, or that any mistake whatever had been made in writing the same. In such a case parol proof contradicting the

deed would not be admissible even in equity. We think that the obvious common sense meaning of the words in the deed, "be the same more or less," is, that the parties should run the risk of gain or loss, and if the quantity proved greater or less than the quantity sold, the parties should abide by their bargain. In Joliffe v. Hite, (1 Call. 301,) it was held that if the vendor sells a tract of land so many acres, "more or less," and it turns out on a survey, that there is less than the estimated quantity, the buyer shall not be relieved in equity. In Young v. Craig, (2 Bibb,) it was decided that the words "more or less" in a deed were evidences that the parties risked a gain or loss in the estimated quantity, though it is admitted that equity would relieve against fraud or palpable and gross mistake. In both of these cases, the deficiency in the quantity of land greatly exceeded the deficiency in this case.

In Dozier v. Duffie, (1 Ala. 320,) in a bond for title, the vendor described the land by its appropriate designation in the land office (as in the deed in this case,) containing so many acres more or less. The sale embraced a number of tracts sold, and there was no statement at the close of the entire number of acres sold; held, that there was no stipulation or covenant on the part of the vendor of the quantity of acres sold; that it was a sale by metes and bounds, and that no reduction of the price could be had, there being no fraud, for a deficiency in the quantity. The correctness of this decision was fully recognized in the case of Minge v. Smith, (1 Ala. 419.)

Let the decree be affirmed.

COLLINS *et als.* *vs.* LAVENBERG & CO.

1. The wife's separate estate is bound for the payment of a promissory note executed by her for goods, wares and merchandize furnished to her and her family.
2. A fact occurring subsequently to the filing of the original bill must be averred by way of supplemental bill, and cannot be brought to the knowledge of the court by amendment.

3. Husband, by deed, conveyed his entire property, consisting of negroes and other personalty, to a trustee, in trust, after the payment of all the debts which he then owed, "for the sole and exclusive use, benefit, maintenance and support of his wife and children, free from all debts and liabilities afterwards to be contracted by himself, to be held, used and enjoyed without division or distribution until his death, and after his death the said estate to vest absolutely, discharged from the trust, in his said wife and children in equal parts, share and share alike." L. & Co. filed a bill against the trustee and *cestuis que trust*, to enforce the collection, out of the wife's separate estate, of a promissory note executed by her for necessaries furnished to her and her family. The death of the husband *pendente lite* was brought to the knowledge of the court by an amended bill. *It was held*,

1. That at the filing of the original bill, the *corpus* of the trust could not have been sold in satisfaction of the complainants' demand, but the wife's share in the profits might have been separated and subjected.
2. That it was erroneous to decree that the property should be hired out for the purpose of raising a fund, since this violated the rights of the children.
3. That the death of the husband, and consequent change in the character of the trust property, should have been averred by way of supplemental bill.
4. That a partition of the estate should have been made, for the purpose of separating the wife's interest.

ERROR to the Chancery Court of Lowndes. Tried before the Hon. J. W. Lesesne.

LAVENBERG & Co. filed this bill against Mrs. Louisa L. Collins et als. for the purpose of enforcing out of her separate estate the collection of a promissory note which she had executed for goods, wares and merchandize furnished by complainants to her and her family. Wiley Collins, the husband of Mrs. Louisa Collins, had conveyed his entire property, consisting of negroes and other personal property, to a trustee, in trust, after the payment of all the debts which he then owed, "for the sole and exclusive use, benefit, maintenance and support" of his said wife and such children as they then had or might afterwards have, "and to the survivor or survivors of them for and during the natural life of him, the said Wiley Collins, (the said trust estate, or proceeds therein provided for the said Louisa Collins, to be held to and for her sole and separate use, free and discharged from all con-

tracts, engagements, debts and liabilities of the said Wiley,) to be held, used and enjoyed without division or distribution until the death of the said Wiley;" and after the death of the said Wiley, the said estate and the whole of it to vest absolutely, free and discharged from all further trusts, in the said Louisa and such of their children as should then be living, in equal parts, share and share alike.

Mrs. Collins and her husband, and the trustee, were made defendants to the original bill. An amended bill was afterwards filed, alleging the death of the husband after the filing of the original bill, and making the children parties defendants. The answers of Mrs. Collins and the trustee deny that the trust estate is bound for the payment of the note, and contain several demurrers to the bill. 1. Because the original bill contained no equity. 2. Because the bill, as amended, contained no equity. 3. Because the amendments make a new and entirely different case from that made by the original bill. 4. Because the original bill and the amendments thereto are incongruous and inconsistent.

The chancellor granted the relief prayed, and directed the appointment of a receiver "to take charge of the property mentioned in said trust deed; and from the proceeds or profits of that portion belonging to Louisa L. Collins to pay the amount due complainants, and the costs of suit."

Stone & Judge, for plaintiffs in error:

1. At the filing of the original bill, Mrs. Collins had no separate estate in the property which could be subjected to the payment of the note, except, perhaps, her proportion of the proceeds and profits of the property.

2. On the death of her husband, Mrs. Collins' interest became an absolute estate, in and to one share, she and her children sharing equally. Her interest, then, could only be subjected by her creditors, by a *bill for partition*, or with appropriate allegations to separate her interest from that of her children, and subject it to the payment of her debts.

3. The death of Wiley Collins and the consequent change in the character of the trust property ought to have been brought before the court by supplemental bill. The demurrer to the bill, as amended, should have been sustained.

4. The appointment of a receiver for an indefinite period of time works an injury to the rights of the children.

J. M. Bolling, *contra:*

1. The separate estate of a married woman is liable for all the debts, charges, incumbrances, and other engagements which she does, expressly or by implication, charge upon it.—2 Story's Eq. Jur., §§ 1398-9-1400; 17 Ala. 797.

2. The rule that requires all legal remedies to be exhausted before a resort can be had to a court of equity, does not apply to a case like the one at bar, for here the remedy exists in equity, independent of that at law.—17 Ala. 797. When this bill was filed the husband was living. It was not necessary to proceed to judgment against the husband, and the wife could not have been sued at law. When the husband died, the suit could properly abate as to him, and proceed against the other parties, without making his representative a party. The property is not yet divided, and there is yet no remedy at law.

3. When property is given to a *feme covert* and her children, to be enjoyed jointly or collectively, the creditor's only remedy is in a court of equity, where the interest of the mother may be separated and subjected to the payment of her debts.—9 Ala. 1002; 10 ib. 328; Ib. 702.

4. The amendment of the bill was properly allowed before the chancellor.—Story's Eq. Pl. 887; Mitford's Ch. Pr. 325. A supplemental bill is never resorted to, when the same end can be obtained by an amendment.—Story's Eq. Pl., § 614; 3 Paige's Ch. 505; 3 Atk. 111-371; 2 ib. 15.

CHILTON, J.—The case of Bradford v. Greenway et al., 17 Ala. 797, is in point to show that the separate estate of Mrs. Collins is bound for the payment of this note. But it is very clear, that the case made by the pleadings does not warrant the relief which was granted by the chancellor. The bill was filed at a time when the *corpus* of the trust, according to the provisions of the deed, could not have been sold in satisfaction of the demand, but the wife's share in the profits might well have been separated. Since that time, however, the grantor has died, and the deed provides that upon his death the property shall vest absolutely in Mrs. Collins and the children, discharged of the

trust, share and share alike to each. It was erroneous, therefore, to hire the property out to raise a fund, since this violated the rights of the children, but the change in the character of the estate should have been averred by way of supplemental bill, and a separation of the interest of Mrs. Collins by partition should have been made, so that her share of the property might have been hired out, or sold, as the case may require, for the satisfaction of the plaintiffs' demand. The death of Wiley Collins, and the consequent change in the nature of the estate, is stated by way of amendment, instead of supplement, and the bill is demurred to for this cause. The demurrer was well taken, and should have been sustained.—Story's Eq. Pl., § 646; Walker v. Hallett, 1 Ala. 397; Bowie v. Minter et al., 2 Ala. 406; Hill v. Hill, 10 ib. 527; Cunningham v. Rodgers, 14 ib. 147. We think, however, the court should not, had it sustained the demurrer, have dismissed the whole bill, as the demurrer goes to the last amendment filed. Consequently, we do not feel authorized to dismiss the bill in this court; but order the decree to stand reversed and remand the cause, that the plaintiff may apply for leave to file a supplemental bill, properly presenting this new matter, which has arisen since the original bill was filed.

Decree accordingly.

PERRINE *vs.* CARLISLE.

1. A party seeking relief in equity against a judgment at law, on the ground that he was ignorant of his defence until after the rendition of the judgment, must show the exercise of ordinary diligence to discover it, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his own part.
2. The defendant in a judgment has a full and complete remedy at law, by *supersedeas*, to obtain credit for a part payment of the judgment, and consequently such payment constitutes no ground for equitable relief.
3. When a bill is filed for relief, and the jurisdiction of the court is

sought to be maintained on the ground of discovery alone, the bill should allege that the complainant is unable to prove the facts upon which he relies for relief otherwise than by the answer of the defendant.

ERROR to the Chancery Court of Mobile. Tried before the Hon. J. W. Lesesne.

THE allegations of the bill are, that Perrine became accommodation endorser on a certain bill of exchange for Riha, Sykes & Co., and left it with them to be used at its par value; that Riha, Sykes & Co., becoming embarrassed, sold the bill at a heavy discount to Carlisle; that Carlisle sued Perrine and Riha, Sykes & Co. on the bill, and recovered judgment; that Perrine had no knowledge, until after the rendition of the judgment, of the manner in which Carlisle obtained the bill, but supposed that he had obtained it in the regular course of business for its par value; that since the rendition of the judgment, complainant had learned from Carlisle himself that he had purchased the bill at a heavy and usurious discount; that execution issued on the judgment against Riha, Sykes & Co., under which eight hundred or a thousand dollars were collected; that execution also issued on the judgment against complainant, which was returned "no property found;" that thereupon Carlisle filed his bill in equity against complainant for a discovery of his estate, and after obtaining a discovery, had issued another execution against complainant for the full amount of his judgment, which execution was then in the hands of the sheriff, and had been levied on complainant's property.

The bill seeks relief against the judgment, and a discovery from the defendant as to the amount which he paid for said bill, and the amount which had been collected on said judgment against Riha, Sykes & Co. The chancellor dismissed the bill for want of equity.

HOPKINS, for plaintiff in error:

As the bill was dismissed for want of equity, all the allegations are entitled to the same effect as if they had been admitted by the defendant.—Bryant v. Peters, 3 Ala. 160. As the plaintiff was the accommodation endorser of the maker, the purchase of the bill by the defendant, at a greater discount than the

legal rate of interest, was usurious, (1 Por. 57; 14 Ala. 668;) and the plaintiff was only bound to pay the sum, without interest, which the defendant gave for the bill. The defendant is chargeable with notice that the complainant was an accommodation endorser, from the fact that the bill, endorsed in blank, was in the hands of the drawers.—1 Ala. 565; 18 Wend. 466. The defendant, then, was not a *bona fide* purchaser in the regular course of trade, and the complainant is entitled to any defence which he might have made if the defendant had been informed of it before his purchase. The defendant is chargeable with notice that Riha, Sykes & Co. had no right whatever to sell the bill for less than its par value, and if he purchased with this knowledge he is not entitled to recover at all upon it.—13 Ala. 390; 16 Wend. 574.

The presumption of law is, that Carlisle purchased the bill in the regular course of business, and that the transaction was entirely legal. The complainant, then, is not chargeable with negligence, in relying upon this presumption and omitting to make inquiry of the parties as to the character of the purchase. As complainant was ignorant of the usury until after the rendition of the judgment, he is entitled to relief against the whole judgment.—2 Por. 262; 1 Stew. & Por. 41.

This bill is one for discovery as well as for relief. Every bill for relief is one for discovery also.—Wigram on Disc. (11 Law Lib. 1, 3, 5, 13, 27.) The bill seeks a discovery as to the amount paid for the bill, and the amount collected on the judgment against Riha, Sykes & Co. The "*audita querela*" is in the nature of a bill in equity, for which a petition and *supersedeas* are now substituted.—4 Ala. 572; 2 Black. Com. 313, note 3. The exercise of an equitable power by a court of common law does not deprive a court of equity of any of its power, but makes the jurisdiction concurrent, and the power becomes exclusive in the court which first takes jurisdiction.—1 Story's Eq. 80; 9 Wheat. 532. The usury in this case gives the court jurisdiction of that branch of the case, and having jurisdiction as to part, the court will take jurisdiction of the whole case to avoid a multiplicity of suits. If there be a legal remedy by *supersedeas*, the complainant, having a right to a discovery of the amount paid on the judgment, is also entitled to relief as consequent upon the discovery.—1 Story's Eq. § 81, 83, 84.

GIBBONS, *contra.*

DARGAN, C. J.—As the defences set up to the debt anterior to the judgment at law are purely legal, the question is, whether this court has jurisdiction to afford the relief that the court of law was fully competent to give. The established doctrine of this court is, that equity will not interfere after a judgment at law, unless the party can impeach the justice of the judgment on grounds of which equity alone can take cognizance, and if the defence to the judgment could have been made at law, the party must then show that he was prevented from making it by fraud, accident, or the act of the opposite party, unmixed with negligence or fault on his part.—French v. Garner, 7 Por. 549; Lee & Norton v. The Insurance Bank of Columbus, 2 Ala. 20; Stinnett & Townsend v. The Branch Bank at Mobile, 9 ib. 120.

Testing the bill by this rule it is without equity. The allegations are, that the complainant endorsed the bill for the accommodation of Riha, Sykes & Co., and left it in their hands to be used at its par value, but they becoming embarrassed in their circumstances, sold it at a heavy and usurious discount. The bill also alleges that the complainant had no knowledge of the usurious transaction, by which Carlisle became possessed of the bill, until after the rendition of the judgment at law, but believed that he became possessed of it in the usual course of trade. The bill also shows that Carlisle himself, after the rendition of the judgment, informed the complainant of the terms on which he obtained the bill, but it alleges that this information was concealed by him from the complainant until the judgment was rendered.

Upon these allegations the inquiry arises, whether due diligence would not have required the complainant to make inquiry, before the rendition of the judgment, into the character of the transaction by which Carlisle obtained the bill, and thus learned the character of his liability, or the grounds of his defence. In the case of Lee & Norton v. The Insurance Bank of Columbus, (2 Ala. 20,) the bill showed that the complainants were the accommodation endorsers of one Hooker, and it alleged that they did not know of their legal defence until after the rendition of the judgment at law. This court held, that due diligence re-

quired that the complainants should have made inquiry of Hooker, who, it was to be presumed, was apprised of the facts, and would have given the proper information to enable them to make their defence at law; and as they had failed to make such inquiry, they were not entitled to equitable relief. In the case of Stinnett & Townsend v. The Bank, (9 Ala. 120,) one of the grounds of equity was that Douglass, the principal in the note, who was dead, had paid the bank fifty dollars before the rendition of the judgment. It was also averred, that the complainants had no knowledge of this payment until after the judgment had been rendered. The court said, that it did not appear that the complainants had used any diligence to ascertain the state of accounts between the Bank and the principal, nor that such information could not have been obtained upon due inquiry. On this ground relief was denied. In the opinion delivered in that case, it was said that a party who seeks the aid of a court of equity after a judgment at law against him, on the ground that he was ignorant of his defence, must show the exercise of ordinary diligence to discover it, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part. If we sustain this bill, we must overrule both of these decisions; for it is apparent that Riha, Sykes & Co., for whose accommodation the note was endorsed by the complainant, knew the terms upon which they parted with the note; consequently they could have given the complainant all the information that he could have desired to enable him to defend at law. But he made no inquiry of them, nor used any effort to discover his defence. His failure, therefore, to defend himself at law, cannot be said to be unmixed with negligence on his part, but on the contrary, his neglect has been such as to deprive him of all right to equitable relief.

As to that portion of the bill which seeks relief on the ground that since the rendition of the judgment Riha, Sykes & Co. had paid upon it eight hundred or a thousand dollars, it is sufficient to say, that the complainant has a full and complete remedy at law, for the court on which the judgment is rendered can supersede the execution, in whole or in part, as the facts and the rights of the parties may appear.—Lockhart v. McElroy, 4 Ala. 527; Edwards v. Lewis, 16 Ala. 813.

It is also insisted that the bill should be retained on the ground of discovery. But that is not the character of the bill. It is purely a bill for relief, and not for discovery merely; and when the jurisdiction of the court is sought to be maintained on the ground of discovery alone, the bill being one for relief, it must be shown that the discovery is necessary to enable complainant to prove his case. The bill, therefore, should allege that complainant is unable to prove the facts on which he relies for relief otherwise than by the answer of the defendant. There is no allegation in this bill that a discovery from the defendant is necessary to prove any fact upon which the complainant relies for relief, or that he cannot, by proof other than by the answer, prove any or all of them.

We can perceive no ground on which the jurisdiction of the court can be sustained, and the decree dismissing the bill must be affirmed.

McKENZIE *vs.* STEVENS.

1. When a father pays without objection an account contracted by his minor son while attending school at a distance from home, the payment is equivalent to a recognition of the son's authority to bind him, and will render him liable on a similar account subsequently contracted.
2. When the authority of the son to bind his father for goods furnished is once shown to exist, the lapse of fifteen months will not overcome the presumption of the continuance of that authority, so as to discharge the father from liability for goods subsequently furnished, it being shown that during all that time the son was absent from the place where the two accounts were contracted.
3. The authority of the son to bind his father by the purchase of goods being established, the declarations of the son respecting the subject matter are also admissible evidence against the father, if made at the time of the purchase and constituting a part of the *res gestæ*.
4. In assumpsit against the defendant for goods furnished to his minor son, the facts being proved from which the law will presume the son's authority to bind his father by such contracts, and no proof

being offered to rebut this presumption, it is not error for the court to charge the jury that if they believe the evidence they must find for the plaintiff.

ERROR to the Circuit Court of Tallapoosa. Tried before the Hon. Robert Dougherty.

SEABORN WILLIAMS, for plaintiff in error.

CLOPTON & LIGON, *contra*.

COLEMAN, J.—We think the court properly admitted the declarations of Peter McKenzie, made at the time of his purchasing the articles, in the year 1846. The bill of exceptions discloses that in the year 1844, Peter McKenzie, a youth, the son of said John McKenzie, was at school at Tuskegee, fourteen miles distant from his father's residence, and that during that year he purchased goods from the plaintiff, which by his direction were charged on account to his father, who, about January, 1845, paid the account without expressing any disapprobation, or giving any notice not to credit any further; that the son was absent from Tuskegee during the year 1845, and on his return and residence there in 1846, he contracted the account sued for, all the items of which were proved as set forth; that in 1844, the son was seventeen or eighteen years old, and his father a wealthy planter.

In Bryan v. Jackson, 4 Conn. 288, the defendant's minor son had taken up goods of the plaintiff, which the defendant paid for, without objection, or giving notice not to trust his son any further; and the son afterwards took up other goods of a similar nature. It was held, that the payment so made by the defendant was equivalent to a recognition of his son's authority, and rendered the defendant liable for the goods, although he had (but without the plaintiff's knowledge,) given positive orders to his son to contract no more debts, and had placed him under the care of a friend, with instructions to furnish him with every thing necessary and suitable for him. It has been settled that a single payment, without disapprobation, for what a servant bought upon a credit, is equivalent to a direction to trust him in future.—2 Greenl. Ev., § 65; Story on Ag., § 56; 1 Bl. Com. 420. And where a personal relation or state of things is once

established by proof, the law presumes that the relation or state of things continues to exist as before, till the contrary is shewn. 1 Greenl. Ev., § 41. It is insisted in this case, that the lapse of time, the intervention of about fifteen months between the dates of contracting the two accounts, overcomes the presumption of the continuance of the agency of the son. This circumstance is sufficiently explained, we think, by the fact of the son's absence from Tuskegee during the fifteen months, and when he again applied to the plaintiff for goods, under circumstances similar to those under which he contracted the first account, the continuance of his authority might be presumed. The agency of the son to bind his father in the purchase of goods being thus established, it is clear that his declaration respecting the subject matter will also bind him, if made at the same time and constituting part of the *res gestæ*.—1 Greenl., § 113.

No testimony having been introduced by the defendant, the court charged the jury that if they believed all the evidence, they must find the amount of the entire account for the plaintiff.

A father is not bound by the contract of the son, even for articles suitable and necessary, unless an actual authority be proven, or the circumstances be sufficient to imply one. But here it is contended that the proof fully justified the legal presumption of the existence of such authority, and that the court in the charge only declared what that presumption was. On the contrary, it is insisted that the question whether the son was authorized to bind the father, in the contracting the account sued on, is a question of fact exclusively for the jury, and that in the charge given, the court invaded the province of the jury. The question is, undoubtedly, a mixed question of law and fact, where, the facts being ascertained, the court will direct the jury as to the legal inference they would be bound to make. The facts were proven to the jury, from which, according to the authorities above cited, the law presumed an authority from the father to the son to buy the goods, and there was no proof to rebut the presumption. This, we think, authorized the court to charge the jury, that if they believed the facts, they were bound to infer the authority; in other words, they were bound to find for the plaintiff, &c.

Let the judgment be affirmed.

MATLOCK *vs.* MALLORY.

1. A contract between the plaintiff and the defendant in execution, by which the plaintiff agreed to delay enforcing the collection of the execution until the ensuing term of the Supreme Court that the defendant might take the case up for revision, and the defendant, in consideration of the delay, agreed to pay ten *per cent.* on the amount of the execution if the case was affirmed, is usurious.
2. When the contract declared on is usurious on its face the declaration is demurrable.

ERROR to the Circuit Court of Benton. Tried before the Hon. L. P. Walker.

ASSUMPSIT by Matlock against Mallory on a written contract, in the following words: "Whereas John Matlock recovered a judgment in the County Court of Benton, at the July Term, 1844, and had execution to issue thereon for $4332 29, which execution I caused to be enjoined by bill in chancery, in the Chancery Court of Benton, and the said Chancery Court did, at the July Term, A. D., 1845, dismiss said bill and dissolve said injunction; and thereupon I prayed an appeal, which was allowed by said court, and twenty days given to give bond; and whereas I failed to avail myself of that order, and did not take said appeal in the time allowed by said court. Now it is agreed on my part for and in consideration, that said John Matlock has consented and agreed on his part to delay the execution now in the hands of W. J. Willis, sheriff of Benton, until the next term of the Supreme Court, in order that I may carry said cause to the Supreme Court, and in the event said Supreme Court shall affirm said judgment and decree of said Chancery Court, then I agree that said Matlock shall have ten *per cent.* damages on the amount of said execution thus held up and delayed, for said delay; all which I agree to without cavil or dispute."—(Signed) WM. MALLORY."

The declaration set out the contract, and averred that the plaintiff did delay the collection of the execution, and that the case was taken to the Supreme Court by the defendant, and the decree of the chancellor in all things affirmed. The defendant demurred to the declaration, and his demurrer was sustained.

J. B. MARTIN, for plaintiff in error:

1. The demurrer to the declaration should not have been sustained. The declaration presents a good cause of action, and if it be true that the contract is usurious, it only avoids the contract when set up by a plea.—Lloyd v. Scott, 4 Peters' U. S. 224; Comyn on Usury, 201; 3 Salk. 291; 5 Coke's R. 119.

2. The written agreement sued upon is not upon its face usurious. To constitute usury there must be, 1st, a contract to loan upon the one part, and to borrow upon the other; 2d, there must be an intentional reservation of more than the legal rate of interest for the loan, or forbearance, &c.; and 3d, the return of the principal, or the amount forborne, with the interest, must be certain, fixed and secure. But where by the terms of a contract one party agrees to pay a certain per cent. upon an amount loaned or forborne, dependent, however, upon a contingency which hazards or puts in jeopardy both principal and interest, and upon the which depends his right to demand the return of either, such a contrict is not usurious, whatever may be the per cent. agreed to be paid.—Richards v. Brown, 2 Cowp. 770; Chitty on Cont. 541-2; Maddock v. Rumball et al., 8 East. 304; Thorndyke v. Stone, 11 Pick. 183; Wright v. McAlexander, 11 Ala. 236; Hall v. Haggart & Reynolds, 17 Wend. 280; Dubose v. Parker, 13 Ala. 779; Lloyd v. Scott, 4 Pet. 206; Chesterfield v. Janson, 1 Wills. 286; Flowyer v. Edwards, 1 Cowp. 112; Story on Cont. 600.

3. The contract declared upon falls directly within the rule laid down in the above cases; because it does not originate in a proposition to borrow or loan money, nor was this directly or indirectly the intention of the parties to it; because by the terms of the contract, both principal and interest were put in jeopardy, the plaintiff's right to recover either being contingent, and dependent upon the fact whether the Supreme Court should affirm the decree of the chancellor, or pronounce a judgment perpetually enjoining the plaintiff's judgment. In the latter event, it is clear that the contract secured nothing to the plaintiff; because, by waiving the giving of appeal bond, the plaintiff risked the continuing solvency of the debt; because, by this contract for delay, the plaintiff discharged the securities of the defendant, and thereby risked the ability of the defendant to pay the money.—Ellis v. Bibb, 2 Stew. 63; Everett et al. v. United States, 6 Por. 166; Inge v. Branch Bank, 8 ib. 108. The

contract shows upon its face that the right secured to the plaintiff was contingent, and that he assumed the risk of losing both principal and interest, and such a contract is not usurious. The forbearance of the plaintiff, the cost and trouble incurred by him in the Supreme Court, and the hazard of losing his entire debt, and the benefit of the delay given to the defendant, were a sufficient consideration for the promise of the latter.—Sheppard v. Watrous, 3 Caines, 166; Wheat. Selw. 50.

4. If the positions here assumed by the plaintiff in error are not sustained, then it is contended that the contract is not usurious on its face, and whether it was in fact so should have been submitted to the jury to determine.—Brown v. Harrison & Robinson, 17 Ala. 774; Ketchum v. Barker, 4 Hill, 224; Hutchinson v. Hosmer, 2 Conn. 341; Kent v. Phelps, 2 Day, 483; Comyn on Usury, 123; Scott v. Loyd, 9 Pet. 446.

Rice & Morgan, *contra:*

1. The plaintiff in error could never have recovered damages in the Supreme Court upon the affirmance of the decree in chancery, because the appellant in the Supreme Court was the complainant in the Chancery Court. The statute does not provide for such a case.—See Hooks v. Br. Bank at Montgomery, 18 Ala. 451. And the same authority shows that the decree rendered in the Chancery Court was not such a decree as could be affirmed with damages in the Supreme Court, because that decree was not "for a specific sum of money."

2. If these positions are correct, the entire contract was infected with usury.

3. If, however, the case could have been affirmed with damages in the Supreme Court, provided a bond had been given, still no bond was given, and the legal right of the party plaintiff in the judgment to collect his money was perfect. The sole consideration of the contract was the delay, and the forbearance to collect the money within a certain time.

4. It will not do to say that it was doubtful how the case would be determined in the Supreme Court, and that such a doubt furnishes the consideration to support the contract. That doubt was not settled by the contract; all that was settled was the forbearance to collect the money.—Wright v. Elliott, 1 Stew. R. 391.

CHILTON, J.—The sole consideration for the undertaking of Mallory to pay Matlock ten per cent. on the amount of the execution named in the contract, was the delay in enforcing collection of said execution until after the ensuing term of the Supreme Court. It is certain that upon the affirmance of the chancellor's decree by the Supreme Court, no damages could have been awarded by that court, and if such damages were thus recoverable, this agreement but superadds ten per cent. to them. Neither did the fact that Mallory neglected to give the appeal bond within twenty days, as allowed by the court, prevent him from suing out a writ of error at any time within three years after the decree was rendered. The delay or forbearance in collecting the demand is, then, the entire consideration for the promise here sued on; and this is shown in the declaration. That such agreement constitutes usury, we should be sorry to entertain a doubt. Were such agreements to receive the sanction of the law, the statutes against usury would be, in many cases, perhaps the greater number, utterly impotent to effect the end proposed. It has long been settled that cases of usury are not confined to precise loans of money, but they extend to cases where the relation of debtor and creditor exists, and to cases of wares, merchandize, or commodities.—Drew v. Power, 1 Sch. & Lef. 191; Grimes v. Shrieve, 6 Mon. 553. And when the contract on its face shows that more than the legal rate of interest is reserved for forbearance, the declaration is demurrable; for that which appears need not be pleaded or averred.—Dysart v. Logan, 2 J. J. Mar. 428. The charge in the case before us cannot be justified upon the idea of any risk which Matlock incurred; for he incurred no hazard but such as is common to forbearance in all cases.

We feel quite sure that this agreement, in legal contemplation, is usurious, and the judgment of the court upon the demurrer must be affirmed.

SKINNER *vs.* BARNEY ET ALS.

1. A court of equity will not interfere at the suit of one of the defendants in a judgment at law, to compel the plaintiff to collect his judgment out of another defendant, who by agreement with his co-defendant had bound himself to pay it.
2. Relief will not be decreed to a complainant upon the case established by the answers and evidence, when it is directly opposed to the allegations of his bill.

APPEAL from the Chancery Court at Mobile. Tried before the Hon. J. W. Lesesne.

JONES & STEWART, for appellant:

It is said equity cannot give relief in such a case as this. If this be so, it is very ineffectual to suppress fraud. This is a fraudulent device of Barney.—1 Story's Eq., § 186-87-88-90.

Equity has jurisdiction to apply a remedy where a creditor's judgment is satisfied and it is attempted to be set up against the debtor.—2 Story's Eq., § 876, 886, 877. Equity gives relief in all such cases.—Ib. § 903, 861, 862, 906, 907, 874, 872; 9 Ala. 463. Equity will not restrict itself by enumerating the cases where it will take jurisdiction to suppress fraud.—2 Ala. 572.

Where a contract is made, it must not only be in good faith between the parties, but must not be *mala fide* as to others.—Story's Eq., 333.

The principle that where a creditor has two funds or means of payment, equity will compel him to resort to the one which will save another from loss, is too clear and familiar to need authority. It is fully recognized by this court as well as all others.

It is said equity will not interfere between a creditor and a surety, but will leave the creditor without control. This question, as a single naked question, it is not necessary to consider; there are here other equitable grounds and circumstances. Here is necessary loss to Skinner; here is fraud, contrivance, bad faith and violation of covenant.

Besides, if that argument could apply to the State Bank, it does not apply to Fuller.

The State Bank was guilty of no collusion. The State Bank was voluntarily constituted creditor of Skinner, Skinner hav-

ing confidence in its good faith, and would only ask to be restored to the condition of creditor of the State Bank.

But here Fuller, by his own act, constitutes himself creditor of Skinner by an act of an unusual nature, and afterwards set himself up in the character of an arbiter between Barney and Skinner, knowing that it will defraud Skinner, and without necessity so far as his objects and necessities require. He cannot claim the position of a fair or honest creditor, and has no claim which equity will look to.

Barney, by his own conduct and his acts, has chosen to consider the payment by him made to the bank as payment of Skinner's share of the debt, for he charged him with it in account, and assumed that position in settling with Skinner, and elected to consider the remainder yet due as his own debt. This he had a right to do as between the parties. Barney is in the condition, therefore, of principal debtor as to the balance, and it is his own debt. Fuller is in the same condition, for his contract was to pay the money and give time to Barney. Barney was in his contract the party to pay. The fact clearly appears in the prooof and in his own answer.

The gross evasion of the answer, in answering what nobody charged, and in wholly failing to answer what was charged, and in seeking to evade the force, true meaning and object of his agreement, sufficiently shows the position he occupies towards Skinner, and that alone is strong evidence of fraud, and that he has no standing in a court of equity, and should have none.

As to Fuller, he, in reality, has no interest in the question. He is safe, at all events, and is precisely where he expected to be, independently of Skinner.

To allow these parties to carry out their scheme, would be to give them the aid of equity as an auxiliary to fraud.

Jno. A. Campbell, *contra* :

We insist that no relief can be granted, because the allegations of the bill are contradicted by the answers and are not sustained by the proof.—Reavis' Dig. 263; 13 Ala. 681; 7 How. S. C. R. 137.

The rights of Fuller being those of a creditor, a debt in which the parties were jointly and equally bound at the time of the contract, in which there were no relations of principal and surety,

the arrangements made by Barney and Skinner could have no operation on these claims of Fuller, nor will the court interfere to control the rights of the creditor.—3 Ala. 728; 1 Gill & J. 346; 2 Barb. 484; 6 Vesey 714.

COLEMAN, J.—The complainant's bill in this case alleges in substance that in November, 1845, the Branch of the Bank of the State of Alabama recovered two judgments, one against the complainant, and the other against the defendant Barney and one W. C. Stanley, on a note made by complainant and Barney as principals, and said Stanley as their surety; that by an agreement made between said Skinner and Barney on the 27th March, 1846, Barney undertook, for a valuable consideration, to pay said judgments.

The bill alleges that Barney paid the amount due on the judgment to the bank, but in so doing he resorted to an artifice, the object of which was to violate his agreement and compel the complainant to pay the judgment; that he caused an assignment of the judgment to the defendant Fuller, the broker from whom he borrowed the money to pay it; that Barney agreed with Fuller that he should lend Barney the money necessary to pay the judgment, which loan was to be repaid, with such rate of interest or commission as they agreed on, at a certain deferred period; that Barney induced Fuller to procure a transfer of the judgments, apparently as security to himself, and as a purchase as to complainant, but that in reality it was a payment of the judgment to the bank, made by the procurement and for the use of Barney; that Fuller holds said transfer for the use of, and under the control of Barney, and uses the judgment against complainant as Barney directs, and that they were then pressing the complainant with an execution issued on the judgment. The complainant asks specifically that the judgment be decreed to be satisfied and perpetually enjoined, and for general relief, &c.

Barney controverts the alleged undertaking on his part to pay said judgment, and the answers of Barney and Fuller fully deny all the complainant's allegations as to the payment of the judgment, or that the transaction with the bank was other than a purchase by Fuller, in good faith, of the judgments. In these denials the answers are responsive to the bill, are sustained by the testimony of Lewis, and not impaired by that of Wilson.

Upon a consideration of the whole case we are constrained to come to the conclusion that Fuller is the *bona fide* purchaser and owner of the judgments.

This view of the case makes it unnecessary to examine and decide whether Barney was bound by agreement to pay the judgment, as alleged in the bill. Admitting that Barney was so bound, can a court of equity be asked to interfere with the rights of Fuller as a creditor, and control him in the mode of collecting his judgment? We have been unable to find any authority for such an interference. Even in the case of a proper suretyship, the general rule is, that a court of chancery will not compel a creditor to proceed against the principal debtor before he resorts to the surety.—3 Ala. 728; 6 Ves. 714. The bill in this case was evidently not framed for such a purpose. The relief sought for in the bill is based on the allegation that Fuller *is not* the owner of the judgment, and relief cannot now be given, necessarily founded on the fact that Fuller *is* the owner of the judgment. The principle is well settled that relief can only be granted on a state of facts substantially corresponding with the allegations of the bill.—Reavis' Dig. 263, and the cases there cited; 13 Ala. 681. The relief asked against Fuller in the character of a judgment creditor of Skinner and Barney is based on a fact directly opposed to the allegations of the bill.

Let the decree be affirmed.

DARGAN, C. J., not sitting.

JONES *vs.* STEWART.

1. On a trial of the right of property to slaves levied on under execution and claimed by a son-in-law of the defendant in execution, it is not error to charge the jury, that in determining the *bona fides* of the sale from the defendant to the claimant, they might look to circumstances of unusual particularity attending it, as tending, if unexplained, to show fraud.
2. When the bill of exceptions does not purport to set out all the evidence, the appellate court will presume, against the party excepting, that an affirmative charge was sustained by the evidence.

ERROR to the Circuit Court of Wilcox. Tried before the Hon. Geo. Goldthwaite.

THIS was a trial of the right of property to certain slaves, which had been levied on under execution in favor of Stewart against Benjamin B. Patton, and claimed by the plaintiff in error who was a son-in-law of Patton's. The judgment on which the execution was issued was rendered on the fifth of March. 1849. It was shown, on the trial, that the slaves belonged to the defendant in execution up to the last of January, 1849, at which time the claimant contracted to purchase them, and paid the price agreed on in cash, and that witnesses were called in to count the money and witness the bill of sale. It was also proved, that at the time of the sale the defendant was in failing circumstances, and that the claimant was advised by counsel to have the bill of sale witnessed. The court charged the jury, "that if the defendant and the claimant were unusually particular in relation to the sale, they might, in determining the question of fraud, look to such circumstances of particularity, as tending, if unexplained, to prove fraud;" to which charge the claimant excepted. There was a verdict and judgment in favor of the plaintiff in execution.

GEO. W. GAYLE, for plaintiff in error.

C. C. SELLERS, *contra.*

CHILTON, J.—The charge asserts the principle, that the jury in determining as to the *bona fides* of the sale, might look to circumstances conducing to show unusual particularity, as tending to show a fraudulent intent.

If this charge was warranted by the testimony, we are unable to percieve any thing improper in it. Although, in the language of the books, "fraud seeks concealment," yet the employment of unwonted particularity is sometimes not the least effectual mode of screening it from detection. Parties, in making sales of property, conscious of purity of motive, are ordinarily content with the observance of the easy and natural means to which resort is usually had, and which being natural and easy, and in accordance with our experience, furnish of themselves evidence of ingenuousness. While on the other hand, fraud,

suspicious of itself, is wont to seek additional props, and sometimes overleaps itself in the attempt "to make assurance doubly sure."

From the very nature of the subject, however, it is impossible to lay down any general rule as to what circumstances of particularity shall be considered evidence of fraud. It is obvious that there are many cases in which the circumstances may not only justify, but require the exercise of extraordinary caution, and make such caution consist with the best intention. Whereas, under other and different circumstances, such unusual particularity would be evidence that the parties were endeavoring to bolster up what they knew to be a fraudulent transaction.

In this case the bill of exceptions does not purport to set out *all* the proof; so that it is impossible for us to say whether the circumstances in proof did not fully justify the charge. To *presume* that the charge was abstract, would be to indulge a presumption in favor of the party excepting, and against the regularity of the judgment and proceedings in the court below; whereas the settled doctrine of this court is to construe the bill of exceptions most strongly against the party excepting, and to presume that an affirmative charge was sustained by the evidence.

It results that the judgment of the court below must be affirmed.

HOLMAN *vs.* WHITING.

1. An endorser who is fully indemnified, or one for whose accommodation the note was drawn and who has received the benefit of it, is not entitled to notice of its non-payment.
2. On a demurrer to evidence the court must assume as true every fact which a jury could, with any propriety according to the evidence, find to be true.
3. A., as attorney, recovered a judgment against E. & R. for $900, but could not obtain satisfaction by legal process. R. proposed to give his individual note with a good endorser, for about $300, in full satisfaction of the judgment. He also afterwards proposed to give his note

for the same amount with W., who was his mother, as endorser, and that A. should assign the judgment to her. A. accepted the latter proposition, and executed an assignment of the judgment to W. The assignment was delivered to R., who thereupon gave his note for the required amount endorsed by W., payable in Bank. A. endorsed the note to H., who brought assumpsit on it against W., and relied on these facts to execuse want of notice. *It was held*,

That the evidence, on demurrer to it, was not sufficient to justify the inference that W. assented to the assignment of the judgment to her, or that she was informed of it.

ERROR to the County Court of Mobile.

HAMILTON, for plaintiff in error.

G. N. STEWART, *contra*.

DARGAN, C. J.—This suit is against the endorser of a note made by Rouse and negotiable and payable at the Bank of Mobile; consequently the defendant's liability is to be ascertained by the law merchant regulating inland bills of exchange. As there was no demand of payment and notice to the endorser of the maker's failure to pay, she was discharged, unless the evidence, which was demurred to, will excuse such omissions. The substance of the evidence may be thus stated: Mr. Adams, as an attorney, recovered a judgment against Ensign & Rouse for near nine hundred dollars, but could not obtain satisfaction by legal process; Rouse proposed to Adams that he would give his individual note, with a good endorser, for about three hundred dollars, in full satisfaction of the judgment, but afterwards proposed that Adams should execute an assignment of the judgment in favor of Mrs. Whiting, who is the mother of Rouse, and that she would endorse his note for the amount agreed on. This proposition was assented to by Adams, and he having a personal interest in the judgment, as well as being the attorney who recovered it, executed an assignment of the judgment in favor of Mrs. Whiting and delivered it to Rouse, who thereupon delivered the note sued on endorsed by the defendant; but Adams never conversed with Mrs. Whiting, nor was it shown that she ever assented to this assignment of the judgment, or even knew of its existence. Upon this evidence, it is contended that the defendant must be considered as an endorser who is fully indem-

nified, or as one for whose accommodation the note was made and endorsed for his own benefit. The rule of law, I admit, is, that an endorser who is fully indemnified, or one for whose benefit the note is made and who endorses it, receiving the proceeds or benefit of the note, is not entitled to notice of its non-payment; for the whole object and reason of the notice, in such a case, fails. But we are of opinion, that the evidence would not, with the least degree of propriety, justify the jury in drawing the inference, either that the defendant was indemnified, or that the note was made and endorsed for her accommodation. The only act she did in person was to endorse her name on the note of Rouse. This, within itself, would show her to be a common endorser and entitled to notice of non-payment; and there is no evidence whatever that she ever assented to the assignment of the judgment to her, or that she knew of the existence of such assignment. There was consequently no evidence, from which the jury, with any propriety, could have drawn an inference that would have bound the defendant to the payment of the note. It is said, and I think correctly, that upon a demurrer to evidence, the court must assume as true every fact that a jury could with any propriety, according to the evidence, find to be true.—Dickey v. Schreider, 3 S. & R. 413; Carson v. The State Bank, 4 Ala. 148. This is the extent to which this rule has been carried, and before the court could assume the fact as true, there should be at least some propriety in the verdict of a jury finding it so; but if the jury could not legally or reasonably draw the inference that the fact was true from the evidence, then the court cannot assume the fact to be true. We cannot perceive how a jury could have found that Mrs. Whiting ever assented to the assignment of the judgment to her, or even that she ever knew of its existence, for there is no proof of either of these facts; consequently we cannot assume that she was indemnified, or that the note was made and endorsed for her accommodation. She must, therefore, be considered as a common endorser and entitled to notice of the dishonor of the note. Let the judgment be affirmed.

APPLETON *vs.* TURRENTINE.

1. It is erroneous to dismiss an appeal from a justice of the peace to the Circuit Court, on account of a defect in the appeal bond, when the appellant offers to execute a new and sufficient bond and proceed to trial forthwith.

ERROR to the Circuit Court of DeKalb. Tried before the Hon. George W. Lane.

A JUDGMENT was rendered by a justice of the peace in favor of Turrentine *v.* Watts, on which an execution was issued and levied on certain personal property, to which a claim was interposed by Appleton, and bond given to try the right thereto. A trial was had before the justice, and the property was found subject to the execution. The claimant appealed to the Circuit Court, and executed an appeal bond which was defective. An order was made at the Fall Term, 1845, of the Court, that a new bond be given within one hundred and twenty days; and at the Spring Term, 1847, the appeal was dismissed. The judgment entry recites "that said appellant had failed to give a good and sufficient bond, in accordance to a previous order of this court, and does now fail to give the same. It is therefore ordered by the court that said appeal be dismissed," &c. It appears from the bill of exceptions, that the appellant offered to execute a new and sufficient bond and proceed to trial forthwith.

J. B. MARTIN, for plaintiff in error, cited Bradford v. Dawson & Campbell, 2 Ala. 203; Carter v. Pickard, 11 ib. 673; Alford v. Johnson, 9 Por. 320; Jenkins v. McCawley, 1 Stewart 61.

COLEMAN, J.—The court below decided that the appeal bond given in this case in pursuance of a previous order of the court was insufficient, for the want of a proper authority on the part of the agent making the same, and that the cause should be dismissed, although the plaintiff announced himself prepared to execute a sufficient bond, and offered to execute a good and sufficient bond and go on with the trial.

Without inquiring into the correctness of the decision reject-

ing the bond previously filed, we have no hesitation in deciding that the court erred in refusing to permit the plaintiff to make a new and sufficient bond.

In Bradford v. Dawson & Campbell, (2 Ala. 203,) it was held that the claim bond is intended as a security for the plaintiff in the execution; and although he may insist on the execution of such a one as the statute directs, yet the claim ought not to be dismissed on account of a defective bond, if the claimant will execute a good one under the direction of the court, when the exception is allowed. This practice has been repeatedly recognized in analagous cases, and we cannot doubt its correctness.—Alford v. Johnson, 9 Por. 320; Carter v. Pickard, 11 Ala. 678.

Let the judgment be reversed and the cause remanded.

BARNES *vs.* THE MAYOR & ALDERMEN OF MOBILE.

1. A retrospective operation will never be given to a statute, unless the intention clearly appears on its face that it should so operate.
2. When the judge, by consent of the parties, is substituted in lieu of a jury to try the facts of a case, his decision cannot be revised by the appellate court.
3. It is the duty of the court to construe a law or ordinance and gather its intention from the law itself, and not from contemporaneous avowals of the individual framers of it.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

A JUDGMENT was rendered by the Mayor of the City of Mobile against the plaintiff in error for a fine of twenty-five dollars and costs, for his infraction of a city ordinance. The defendant appealed to the Circuit Court, where judgment was again rendered against him, to reverse which he prosecutes this writ of error. The facts of the case may be collected from the opinion.

LINDSAY & GIBBONS, for plaintiff in error.

JOHN A. CAMPBELL, *contra.*

CHILTON, J.—The ordinance passed by the corporate authority of Mobile, for the violation of which the judgment now sought to be reversed was rendered against the plaintiff in error, is in these words: "Sec. 1. Be it ordained by the Mayor, Aldermen and Common Council of the City of Mobile, that from and after the passage of this ordinance, it shall not be lawful for any person, or persons, to establish within the corporate limits of the city of Mobile the boiling of any materials of which soap or candles are made, or any factory of soap or candles, except in the manner provided for in the second section of this ordinance. Sec. 2. Be it further ordained, that any person or persons desirous of engaging in the business of making soap or candles, shall first obtain the written certificate of the board of health, that the location which he or they have selected for the purpose, is such as will not prove injurious to the health or comfort of the neighborhood. This certificate shall be submitted to the Mayor of the City of Mobile, and if he approve the same, he shall grant a license for the boiling or making of soap at the place named in said certificate." The third section provides a penalty against any one who shall establish within the corporate limits of the city any manufactory of soap or candles, without having obtained the license provided for in the second section, of twenty-five dollars for each day the same shall be continued.

This ordinance was approved on the 4th of August, 1847, and the plaintiff in error, insisting that it was not the design of the Common Council to subject to such ordinance manufactories of soap and candles which had been established previous to its passage, proved that his soap factory had been established and was in operation several years before and at the time the ordinance was passed, and that he had not established any factory or materials for the boiling of soap or making of candles within said corporate limits, since said ordinance was passed. The case has been argued before us by the counsel for the plaintiff in error, under the apprehension that this proof was excluded by the Circuit Court; but upon inspecting the record, it will be seen that he was under a misapprehension, and that the proof was admitted.

We entirely agree with him that the ordinance is alone appli-

cable to establishments for the boiling of materials and the manufacture of soap and candles, erected or established after its passage, and that it was not designed to embrace those which were then in existence. This construction would seem to result from the language itself—"*that from and after the passage of this ordinance*, it shall not be lawful for any person or persons to establish," &c.; that is, permanently to erect, a manufactory for the making of soap or candles, or the boiling of materials from which they are made. The language of this ordinance does not justify us in giving it a retrospective operation; and such construction will never be indulged, unless the intention obviously appears from the law or ordinance that it should so operate.—See Hays v. Gould, at the present term, and cases there cited. But notwithstanding this conclusion, the plaintiff in error can take no benefit from it in the present trial, as he failed in the court below to call forth the action of the court upon it as constituting a defence to the action. The judge, by consent, was substituted in lieu of the jury, to try the facts, and the defendant below prayed the court for judgment in his favor, on the grounds that the corporation had no power to pass the ordinance, and because the proof showed that the defendant had not violated its provisions. This motion for judgment, as predicated upon the proof, does not raise the question of the liability of the plaintiff in error, as affected by the erection of his establishment anterior to the passage of the ordinance. It merely presents a question of fact to be determined upon *all* the proof, and this the bill of exceptions does not purport to set out; but if all the evidence had been spread upon the record, we should have no more power to revise the verdict of the judge upon the facts, than if such a verdict had been rendered by a jury.—Etheridge v. Malempre, 18 Ala. 565; 16 Pet. 169; 7 How. U. S. R. 833.

We entertain no doubt but that the corporation has full power given it by the Legislature (Acts of 1844, 179, § 15, 189, § 43,) to pass such ordinance. It is but a statutory police regulation, designed to promote the health and comfort of the citizens.

There is no force in the exceptions that the court rejected evidence showing that a committee of the corporation had, previous to the passage of the ordinance, examined the establishment of the plaintiff in error and pronounced it a public benefit. It is not pretended that this amounted to a contract between the city

and the plaintiff in error, nor does it even appear that the examination referred to was an authoritative, binding act of the corporation as such. It is therefore unnecessary for us to inquire what would be the effect of a contract entered into between the corporation and a citizen, for the erection of such an establishment, upon the powers of the corporation to abate it, should it subsequently turn out to be a public nuisance. The proof offered of the existence of another establishment of a similar kind in the city at the time the ordinance was passed, and that it was the avowed object of the corporation not to include them in the provisions of the ordinance, was properly ruled out, as obviously illegal. It is for the court to construe the ordinance and gather the intention of the law-maker from the law itself, and not from the contemporaneous avowals of the individual law-makers. But this has not been seriously insisted on; and, according to the construction we have placed upon the ordinance, the exclusion worked no injury to the plaintiff in error. Our conclusion is, that although it is quite probable the plaintiff in error had a good defence in the court below, the record does not place him in a condition to avail himself of it in this court.

Let the judgment be affirmed.

MURRAY & DURAND, Ex'rs, *vs.* TARDY.

1. When the transcript of a record contains a judgment only, and the clerk certifies "that the same is *all the record* of said cause on file: the balance being lost or mislaid;" the existence of a writ, declaration and plea cannot be presumed from the recitals in the judgment entry that the parties appeared in court by their attorneys, and joined issue, and that the jury returned a verdict for the plaintiff.
2. After the rendition of a judgment, the defendant is entitled to notice of a motion by the plaintiff for leave to substitute papers and file them as a part of the record of the cause.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

G. N. STEWART, for plaintiffs in error:

1. The substituted papers cannot be recognized as parts of the record. The order to substitute is erroneous, because, 1st, it was made without any proof of the loss, and it is not shown whether the loss was before or after judgment; 2d, it was made without notice to the defendants below; 3d, it is general and too broad; it allows plaintiff to file what he pleases, without any proof or restriction, whether similar to the papers supposed to be lost or not; 4th, it is confined to plaintiff, and does not extend to the defendants, nor to supply the whole record. The substituted papers do not appear to be filed under the order, nor does it appear they were authorized to be filed.—Doswell v. Stewart, 11 Ala. 629; McLendon v. Jones, 8 ib. 298; Dozier v. Joyce, 8 Por. 303; Williams v. Powell, 9 ib. 493.

2. It does not appear that the papers existed at the time the judgment below was rendered, therefore the judgment is erroneous. But if they did then exist, and were lost afterwards, then the court cannot affirm, but must dismiss the writ of error, so that a new writ of error may be sued out when the whole record is properly substituted.

PERCY WALKER, *contra:*

1. The order of the Circuit Court for the substitution of the papers was proper.—5 Ala. 608. To sustain a judgment, every thing compatible with the record will be presumed; hence it follows, that the order for substitution will be presumed to have been made upon the proper application and proof.—3 Stew. 444; 11 Ala. 590; 1 Por. 479; 1 Ala. 80-182; 14 S. & R. 220; 3 Dana, 454.

2. Every reasonable intendment will be made in favor of the regularity of the proceedings of courts of general jurisdiction.—3 Ala. 109-632; 1 J. J. Mar. 609. Though no plea appears in the record, the judgment will be supported. The entry showing that the parties appeared in court, joined issue, and that the jury found for the defendant in error, it will be presumed that a plea was filed, &c.—2 Ala. 287; Ib. 337; 3 ib. 632; 3 S. & P. 431-269; 7 Port. 33; 18 Ala. 629; 2 S. & P. 141; 3 Por. 387; 3 Dana, 454.

3. The rule in regard to judgments by default, when no declaration appears, does not apply here; but every thing ne-

cessary to uphold the judgment will be presumed, and it will therefore be intended that there was a writ, declaration, &c.—3 Ala. 557; 6 Por. 352; 15 Ala. 841; 21 Wend. 40; 17 Ala. 278-9.

COLEMAN, J.—Two transcripts of record are filed in this cause. In the first transcript the clerk certifies a judgment only, and that the same is all "the record of said cause on file, the balance being lost or mislaid."

The counsel for the plaintiff in the court below insists that the judgment ought to be sustained, because the entry shows that the parties appeared in court, joined issue, and the jury found a verdict for the plaintiff, and that hence the existence of a writ, declaration and plea should be presumed. We do not think we are authorized to go so far, and in that aspect of the case, must declare the judgment erroneous.

In the second transcript, it appears that after the writ of error was sued out, to-wit, on the 16th of January, 1851, an order was made in said cause in the court below, in these words: "Ordered by the court, that the plaintiff have leave to substitute papers, to-wit, writ, declaration, &c., in this cause, and that he file them as part of the record of said cause."

There is nothing in the record showing that the defendant had any notice of this proceeding, and the question arises whether it can be sustained without such notice? There seems to be some contrariety in the opinions heretofore expressed by this court on this subject. In the case of Wilkinson et al. v. Branham, 5 Ala. 608, it was held, that though *it is proper* to require notice to be given to the defendant, that a motion will be made to substitute a declaration; yet if the court grant the motion without a previous notice, its action will not be considered as void or irregular. The cases of Dozier v. Joyce, 8 Port. 303, and Williams v. Powell, 9 ib. 493, go strongly to show the necessity of notice. In the case of McLendon v. Jones, 8 Ala. 298, the judge, in speaking of the rights of our courts by the common law to substitute lost records, says, "Of course the substitution can only be made, after a personal notice of the intention to move the court, and this notice should be sufficiently explicit to advise the opposite party of what is intended." In Doswell v. Stewart, 11 Ala. 629, the Chief Justice says: "Whether we consider the proceeding in reference to the statute or the common

law, a notice is indispensable to its regularity, and this should be shown either by the return of an officer upon a formal notice, or by an affirmation of the fact upon the record."

It is certainly a most important legal rule, and altogether essential to the proper administration of justice, that whenever a party's rights may be acted on by a court, he should have notice thereof, that he may appear and cross examine the witnesses and defend his interests. The decision in the case of Wilkinson et al. v. Branham seems to be founded on the supposed legal presumption, that after a judgment the parties are still in court and conversant of all that may be further done in the case. This, however, is well known not to be true in the practice of the courts of this State; and if a party should be allowed after judgment to substitute a record, without actual notice, the adverse party would be deprived of the important legal right of having an opportunity of questioning its loss and disputing the truth of the secondary proof.

The judgment is reversed and the cause remanded.

DARGAN, C. J., not sitting.

PAIT *vs.* PAIT.

1. A notice which alleges that the plaintiff was bound as security for the defendant on a certain note which is particularly described, that judgment was rendered thereon against him, that execution had issued on said judgment and that the plaintiff had been compelled to pay a certain sum of money thereon, and specifies the court in which the judgment was rendered and the time of its rendition, is sufficient to authorize a summary judgment [Clay's Dig. 531, § 3,] against the principal, in the same court in which the former judgment was rendered, although the notice does not state in whose favor the judgment was rendered, nor the amount of it, nor the time of the payment by the security.

ERROR to the Circuit Court of Talladega. Tried before the Hon. Robert Dougherty.

WOODWARD, for plaintiff in error.

MORGAN, *contra*.

CHILTON, J.—The statute declares that "in all cases where judgment shall be entered up in any court of record, or by any justice of the peace, against any person or persons as security or securities, their executors or administrators, upon any note, bill, bond, or obligation, and in all cases where execution shall be awarded by, or issued from any of the courts of record, or any justice of the peace, against any person or persons as security or securities, &c., upon any bond, &c., and the amount of such judgment or obligation, or any part thereof, hath been paid or discharged by such security or securities, his heirs, &c., it shall be lawful for such security, &c., to obtain judgment by motion against such principal obligor or obligors, &c., in any court, &c., where such judgment may have been entered up, and execution awarded against such security or securities, &c., for the full amount which may have been paid, with interest," &c.—Clay's Dig. 531, § 3.

The notice in this case, which was treated as the motion, and to which a demurrer was sustained by the Circuit Court, although exceedingly informal, yet when properly analyzed, will be found to present a case which falls within the substantial requirements of the statute.

It shows the execution of a note, which is described with great particularity, the date, amount, when and to whom payable, and that the defendant was the principal, and the plaintiff his security; that judgment upon this note was rendered at a certain term of the County Court of Talladega county, and execution was issued thereupon, and the plaintiff's payment of three hundred dollars on said judgment, in consequence of which he *moves* for judgment against the principal, for the amount paid and interest. Now, although it is not stated in whose favor the judgment was rendered, nor the amount of it, nor the time when the three hundred dollars was paid, yet we think the judgment being in the same court, reference may be had to it to supply these formal defects, and the party can be allowed to prove the time of his payment, so as to fix the date from which interest would accrue. It would certainly have been more regular to have de-

scribed the judgment accurately, referring the court to it, and to have set out the time of the payment; and I confess I have had some difficulty in sustaining the motion, as I am indisposed to encourage such loose mode of pleading. But as the defects can hardly be said to be *substantial*, we think the demurrer should have been overruled.

Let the judgment be reversed and the cause remanded.

STEIN *vs.* BURDEN.

1. The Judge of Probate has jurisdiction to grant writs of *ad quod damnum* in those cases in which the Judge of the County Court had authority to grant them before the abolition of the County Court.

ERROR to the Probate Court of Mobile.

ALBERT STEIN made application, by petition, to the Judge of Probate of Mobile, for a writ of *ad quod damnum* to ascertain the damages occasioned to those interested, by the construction of an aqueduct, resorvoir and dams, which he intended to construct at a point on Bayou Chautauque for the purpose of bringing water from the bayou into the city. The application was made under the authority of an act of the General Assembly, approved December 25, 1841, entitled "An act to amend an act passed January 7, 1841, entitled 'an act for the promotion of the health and convenience of the city of Mobile, by the introduction into said city of a supply of wholesome water to be used for domestic purposes and for the extinguishment of fires.'" Those persons who owned lands above and below the point on the bayou, where the works were to be erected, were made defendants to the petition, and notified of the time and place of executing the writ. On the petition of John Burden, one of the defendants, a *supersedeas* of the writ was granted, on the ground that the Judge of Probate had no jurisdiction in the case; and at the next regular term of the court, on motion of said Burden, the said writ of *ad quod damnum* was quashed, for want of ju-

risdiction in the court to issue it, and a judgment for costs rendered against said Stein, to reverse which he prosecutes this writ of error.

F. S. Blount, for plaintiff in error.

No counsel, *contra*.

DARGAN, C. J.—The only question presented for our revision by the record is this, whether the judges of the Courts of Probate have jurisdiction to grant writs of *ad quod damnum*, in those cases in which the judges of the County Courts had authority to grant them, before the County Courts were abolished? The act of the 11th February, 1850, by which the Courts of Probate were established and organized, in lieu of the County Courts, defines many of the powers and duties of those courts, but expressly denies to them some powers that had been formerly exercised by the County Courts. The 9th section of the act provides, that the judges of the Courts of Probate in their respective counties shall, as members of the Commissioners' Court of Roads and Revenue, perform all the duties that had been done and performed by the judges of the County Courts, and further, that they should have and exercise full jurisdiction of, and do and perform all things now required of the judges of the County or Orphans' Court, except as therein is excepted and provided, &c. On the 13th day of February, 1850, the Legislature passed another act, which provides "that the duties heretofore required or authorized to be performed by either the judge or the clerk of the County Court, *one or both*, of any and every description, and not expressly prohibited or otherwise provided for by the act of the 11th February, 1850, shall be performed, under the same rules and regulations, so far as they are applicable, by the judges of the Courts of Probate." Perhaps the act of the 13th of February effected nothing more than the 9th section of the act of the 11th February did. But its passage is conclusive to show that the Legislature intended to invest the judges of the Courts of Probate with all the powers and jurisdiction that had belonged to the County Courts, save only those powers and such jurisdiction as were expressly denied them. To determine, therefore, whether the judge of the Probate Court had jurisdiction to grant the writ of *ad quod damnum*,

we need only ascertain whether the writ could have been granted by the County Court of Mobile, upon the application of the plaintiff in error as set forth in his petition, and then whether the act of the 11th of February, 1850, by which the Probate Court was established and the County Court abolished, denies to the judge of the Court of Probate jurisdiction and authority to grant the writ. Upon this it is only necessary to say, that the judge or the clerk of the County Court would have had full power to grant the writ, under the act of the 25th December, 1841, (Pamphlet Acts of 1841, p. 5-6,) and neither the act of the 11th of February, 1850, nor any subsequent one, denies this power to the judge of the Court of Probate. He therefore had jurisdiction to grant the writ, and consequently erred in quashing it on the ground of a want of jurisdiction.

Let the judgment be reversed and the cause remanded.

COSTER, ROBINSON & CO. *vs.* THOMASON, USE, &c.

1. A bill of exchange drawn by "*Ebenezer Hearn*" may be given in evidence under a declaration on a bill alleged to have been drawn by "*Ebenezer Hearne*."
2. A statement by a witness "that the habits of business and intimacy between himself and the defendant were such that witness had no doubt if said defendant had received notice of protest of said bill, it would at once have been communicated to witness," is inadmissible evidence for the defendant in a suit on the bill, being a mere expression of opinion, and not the statement of a fact within the knowledge of the witness.
3. When a bill endorsed by a partnership is dishonored after a dissolution of the firm, notice of protest to any one of the late partners is sufficient to bind all.
4. A recital in the notary's certificate of protest, that "notice of the protest had been left at the offices of the endorsers," is not, of itself, sufficient to charge an endorser with notice.

Error to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

ASSUMPSIT on a bill of exchange against an endorser.

HAMILTON, for plaintiff in error:

1. As to the exclusion of the testimony, as shown in the bill of exceptions: The question before the jury was the sufficiency of the notice of non-payment to the endorsers. The firm of Coster, Robinson & Co. had no place of business. The evidence was competent to negative the idea that actual notice had been given.

2. The bill of exchange is misdescribed in the declaration.

3. Proper diligence was not shown. The firm was dissolved at the maturity of the bill, and each member of the endorsing firm was entitled to notice. The dissolution destroyed the mutual agency and each must be notified.—Story on Bills of Ex. 335-6, 343; Story on Prom. Notes, 455; 1 Conn. R. 367; 2 ib. 654; 7 Watts & Serg. 383; 4 Cowen R. 126; 5 Hill's R. 232. The assertion and proof that notice was left at the office of the endorser, without more, is not enough to charge the endorser.—Rives v. Parmley, 18 Ala. 259.

W. G. JONES, *contra:*

1. The bill was properly admitted under the declaration. The difference in the spelling of the two names makes no difference in the pronunciation; and being *idem sonans*, they are in law the same name.—Rex v. Shakspeare, 10 East 83; Dickinson v. Bowes, Kay et al. 16 East 110; Shoober v. Ashurst, 1 Littell 216; Taylor v. Rogers, Minor's R. 197; Cantley v. Hopkins, 5 Stew. & Por. 58.

2. The evidence of the witness, as to his intimacy with Coster, and his inference from that intimacy, was properly excluded. Witnesses must testify to facts, not to their inferences, or opinions as to probabilities.

3. When a bill endorsed by a partnership is dishonored after a dissolution, notice thereof to either one of the late partners is sufficient, and binds all.—Collyer on Part. 399, § 443, and cases there cited; Story on Bills, 336, § 299; ib. 343, § 305; Chitty on Bills, 530; Brown v. Turner, 15 Ala. 833.

4. The certificate of the notary that notice had been left at the offices of the endorsers was sufficient. This precise point was so decided in Curry vs. Bank of Mobile, 8 Por. 360. This

case is distinguishable from Rives v. Parmly, 18 Ala. 256. There was no evidence in that case that Rives had any boarding place in Mobile. Here there was evidence that Coster had an office or place of business in Mobile. In that case too, there was no other evidence of notice than the notary's certificate. In this case, the notary was examined as a witness, and his testimony supplies the deficiencies, if any, of his certificate.

COLEMAN, J.—This was an action brought by the plaintiff in the court below against the defendants, to recover on a bill of exchange drawn on the first day of January, 1846, by Ebenezer Hearn on Messrs. R. L. Walker & Co., Mobile, for the payment, four months after date, to Wm. Kitchen, of $1200, and endorsed by William Kitchen and Coster, Robinson & Co.

By the bill of exceptions it appears that the defendants objected to the introduction of said bill of exchange, as evidence under the first count in the declaration, because the bill declared on purported to have been drawn by Ebenezer "Hearne," while that offered in evidence appeared to be drawn by Ebenezer "Hearn." We think, clearly, that there was no error in the overruling of this objection by the court. Though there is a variance of one letter in spelling the two names, they are pronounced precisely alike, and *idem sonans*, they are in consideration of law the same. In Schoober v. Ashurst, (1 Littell 216,) it was held that "Josiah" and "Josier" should be considered the same name, the difference in pronunciation being too small to amount to a variance.

The plaintiff then read as evidence to the jury said bill of exchange, and the protest and certificate of the notary public, showing the proper demand and refusal of payment of the bill, and averring notice of the same to the defendants in these words: "Notice of protest left at the offices of the first and second endorsers."

The defendants then introduced a witness who stated, in substance, that the firm of Coster, Robinson & Co. was composed of George Coster, Levi Robinson, and one Robert L. Walker; that the firm was dissolved on the last of February, or first March, 1846, after which time they separated; that after said dissolution, witness and said Coster were the acting clerks for David Blair & Co., who occupied the same house formerly occu-

pied by Coster, Robinson & Co., and were the only persons employed in the store during the month of May, 1846; that at that time said Robinson was up the country, and witness did not know where said Robert L. Walker was, nor whether he then had any office in Mobile. "Witness also stated that he never saw any notice of protest of the bill of exchange sued on; that he had known the defendant Coster ever since the year 1833; that he had been constantly employed in the same store and buisiness with said Coster, for about thirteen years, and their habits of business and intimacy had been such that the witness had no doubt, if said Coster had received notice of protest of said bill, it would at once have been communicated to witness, but that he had never heard of any such notice having been received by said Coster. The plaintiff's counsel moved the court to exclude from the jury this last statement, to wit, all that the witness stated tending to show that if Coster had received notice of the protest, then the witness would have been informed of it." The court very properly excluded said statement. It was an expression of opinion, and not a statement of a fact within the knowledge of the witness, and was therefore inadmissible as testimony.

The plaintiff then introduced the notary who protested said bill, who stated "that he did not recollect any thing about said protest; that he knew it was made by him because he had so certified; that he could only state that it was his habit, when a dissolution of a firm whose name was on negotiable paper had taken place after the paper was made, and before protest, to give notice at the office of some one member of the firm, and he had no doubt he had done it in this instance."

This was all the evidence in the case, upon which the court charged the jury, that if they believed notice of protest had been left at the office of any one of the partners of the late firm of Coster, Robinson & Co. on the day the protest was made, this was sufficient to authorize a verdict for plaintiff. To this charge the defendant's counsel excepted, and asked the court to charge, "first, the plaintiff cannot recover unless he shows that some attempt was made to give personal notice of protest to Coster, Robinson & Co., or one of them, and on failure to find any of them, that then the next best method of giving them notice had been resorted to; secondly, the plaintiff cannot recover

in the absence of proof of the notice having been given during business hours; thirdly, if notice may have been left only at the office of Robert L. Walker after the dissolution of the firm of Coster, Robinson & Co., this would not be sufficient to bind the other parties; fourthly, that the evidence in this case is not sufficient to authorize a verdict for the plaintiff; fifthly, that in order to entitle the plaintiff to recover, it is not sufficient for him to show merely that notice of protest was left at the office of one of the late firm of Coster, Robinson & Co.; if the evidence goes no further than this, the jury must find for the defendant; sixthly, that the evidence contained in the protest is not sufficient evidence, by itself, to entitle the plaintiff to recover."

The court refused each of these charges as asked by the defendant, and charged the jury that if they believed the notice of protest was left on the day of protest at the office of any one of the then late firm of Coster, Robinson & Co., this would be sufficient, without any other proof whatever, to entitle the plaintiff to recover.

We believe the law to be well established, that where a bill endorsed by a partnership is dishonored after a dissolution, notice thereof to either one of the late partners is sufficient to bind all. —Collyer on Part. 399, 443; Story on Bills, 336; Chitty on Bills, 530. In Brown v. Turner, (15 Ala. 833,) it was decided, that when a bill of exchange has been accepted by two persons as partners, who at maturity of the bill have dissolved their partnership, and are also absent from the place of their residence, a demand made of the agent of one of the partners is sufficient; consequently there was no error as to the number of the partners notified. We think, however, that the further ruling of the court in the case was in collision with the law as decided in the case of Rives v. Parmley, (18 Ala. 256.) In both of these cases the proof of notice of non-payment, &c., as contained in the notarial certificates, is the same; the same words ("notice of protest left at the offices") being used in both certificates. The court decided, in the case referred to, that the certificate of the notary did not contain evidence of such diligence as the law requires to charge an endorser; that to charge the drawer or endorser of a bill, by notice left at his place of business or residence, it should be delivered to a clerk, if there be one at the former place, or to

some proper person at the latter, if any such there be, or it should be certified that no one could be found on application at such place. It is contended, however, that the verbal evidence of the notary furnished, in this case, additional proof of notice, &c. We are not disposed to controvert this, but we think that the jury must have been led to believe, from the charges given, and those refused by the court, that the evidence contained in the notarial certificate alone, and without the other evidence in the case, was, in the opinion of the court, sufficient to authorize a verdict for the plaintiff. In this we think there was error, and therefore order the judgment to be reversed and the cause remanded.

FONTAINE & DENT *vs.* BEERS & SMITH.

1. The declarations of one who is in possession of property either real or personal, explanatory of his possession, are admissible evidence as part of the *res gestæ*.
2. When evidence, a part of which is legal, is objected to as a whole, the court is not bound to separate the legal from the illegal part of it, but the motion to exclude may be refused.
3. On the trial of the right of property in a vessel, on which an attachment had been levied, and a claim interposed under the statute, the plaintiffs may prove directions given to the captain of the vessel by the defendant in attachment, before the levy, under which the former acted.
4. But directions given to the captain by the defendant subsequent to the levy and interposition of the claim are irrelevant and inadmissible.
5. Whether such subsequent directions would be irrelevant, when offered in connection with proof that the claimants held a lien merely for their indemnity, which lien had been discharged by the defendant after the claim had been interposed. QUERE?
6. The declarations or admissions of the defendant, made while in possession of the brig before the levy, in disparagement of his title or interest, are admissible evidence.
7. When the parties proceed to trial upon an issue whether "the brig levied on was, at the date of the levy, subject to the attachment," a

bill of sale bearing date after the levy is *prima facie* irrelevant, as being outside of the issue.

8. But such an issue is itself immaterial.

9. The interest of the mortgagor, while in possession of the property before the law day has arrived, is subject to levy; but when the mortgagee becomes entitled to the possession, upon default being made, he may claim the property, and terminate the sheriff's possession.

10. But if the mortgagor discharges the lien by paying the mortgage debt before the trial of the claim suit, the assertion of his intervening claim by the mortgagee cannot prevent a condemnation of the property.

11. The statutes of this State requiring the registration of mortgages, deeds of trust, &c. on personal property do not apply to vessels for the navigation of the ocean. The evidence of title in them is to be looked for in their ship papers and registration according to the acts of Congress.

12. A written instrument is required to pass the title to a ship, as determining its national character; but as between vendor and purchaser, a parol sale, consummated by delivery, will be good to pass the title.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

BEERS & SMITH sued out an ancillary attachment against George H. Johnson, which was levied, on the 12th June, 1849, on the Brig Republic, then lying at the wharf in Mobile. A claim was interposed by Fontaine & Dent, and bond given to try the right of property. The parties proceeded to trial upon the issue whether the Brig, at the date of the levy, was subject to the attachment. A bill of exceptions, which was sealed on the trial, discloses the following state of facts.

Previous to February, 1849, the Brig belonged to Heirn & Le Baron, (the title being in Heirn alone,) who sold it in February to Johnson and one Smith, Johnson purchasing five-sixths, and Smith one-sixth. The purchasers gave their promissory notes payable at a future day, and the vendors executed to them a bond, conditioned to make title to the Brig on the payment of the notes. Smith, who was examined as a witness for the plaintiffs, testified that, after their purchase, he made one voyage with the Brig from Mobile to New York; that he acted as captain during the voyage, but always was governed by the direc-

tions of Johnson, as to the business &c. in which the Brig should be employed; that in May, 1849, he sold out his interest to Johnson, but still continued to manage the vessel as captain, under Johnson's directions, until some time in July, 1849; and that during all this time he only knew Johnson as her owner, and was employed by him. "The plaintiffs then, with a view of proving continuing control and ownership by Johnson, from the time of their purchase to the time of her leaving Mobile, and after the levy and claim interposed, asked the witness what Johnson did, if anything, about taking the vessel to sea. To this the claimants objected; but their objection was overruled, to which they excepted. Witness replied, that the Brig went to sea in July, 1849, under the direction of Johnson, and that Johnson paid the pilotage and expenses." Letters written by Johnson to the master of the vessel, while on the voyage from Mobile to New York, giving directions as to the business in which she should be engaged, were offered in evidence by the plaintiffs, and admitted by the court against the claimants' objection. The declarations of the mate, who was in command of the vessel at the time of the levy, were also objected to by the claimants, but their objection was overruled, and the declarations went before the jury. Johnson's notes for the purchase money of the Brig were endorsed by Fontaine & Dent, and were paid in Bank by them at maturity; and afterwards, in the summer of 1850, Johnson refunded to them the money so paid. The bond for title was assigned by Johnson to Fontaine & Dent, on the 17th February, 1849, to secure them against their liability as endorsers of his notes; and a bill of sale was made to them by Heirn, on the 14th June, 1849, when they had paid Johnson's notes. This bill of sale was offered in evidence by the claimants, and was excluded by the court, to which they excepted. The claimants offered to prove by a witness admissions made by Johnson, while in possession of the Brig, after his purchase and before the levy of the attachment, as to the title, but the evidence was excluded by the court, and the claimants excepted. There was a verdict and judgment for the plaintiffs in attachment. The errors assigned will be understood from the opinion.

Wm. G. Jones, for plaintiff in error:

1. The declarations of Beverly were mere hearsay, and should

have been excluded. Beverly was not a party to the suit, did not pretend to have any interest in the Brig, and was not the agent of Fontaine & Dent. These declarations were admitted by the court, as being declarations of a party in possession, explanatory of his possession, and part of the *res gestæ*. It is submitted, that the admission of declarations as part of the *res gestæ* has already been carried so far as seriously to impair the salutary principle excluding hearsay evidence, and to lead to great uncertainty and confusion in the law. But none of the cases go so far as to admit these declarations. Beverly was a competent witness; his possession was temporary; his declarations went not only to the possession, but to the title of the property.—8 Ala. 650; 10 ib. 358; 17 ib. 314; Ib. 362. Where the declarant is not the party, nor the agent of the party, against whom the declarations are offered, but is himself a competent witness, and might be examined in the case, his declarations are inadmissible.—8 Pick. 127; 2 English's R. 276; 10 Conn. 12; 15 Johns. 496; 4 B. & C. 325, (10 En. Com. L. R. 345;) 3 C. & P. 179, (14 En. Com. L. R. 261.) This principle was expressly recognized in 1 Stew. & Por. 453, and the court is now urged to re-assert it.

2. The admission of the letters from Johnson to Smith was also erroneous according to the principle above stated, and for the further reason that they were irrelevant to the issue. They were not contemporaneous with the contract of purchase by Johnson, nor with the levy of the attachment. They were not explanatory of, and did not accompany any act done. The declarations made by Johnson to a third person, without the knowledge of Fontaine & Dent, ought not to be received to defeat their rights.

3. The acts of Johnson after the interposition of Fontaine & Dent's claim are not admissible to defeat their claim or title, unless it is shown that they were done with their knowledge or consent.

4. The bill of sale from Heirn to Fontaine & Dent, made in pursuance of the contract of February 17, 1849, and its transfer to F. & D. ought to have been admitted in evidence. Though made after the levy, it was made before the claim of F. & D. was interposed.—4 Ala. 475; 6 ib. 35.

5. If the declarations of Johnson and his agent, in his own fa-

vor, were admissible evidence against the claimants, certainly his admissions in disparagement of his own title, made whilst in possession, ought to be received in favor of the claimants.—10 Ala. 429; 17 ib. 10; Ib. 608; 26 Maine, 107.

6. The title to ships does not pass by parol, or delivery. It can only pass by bill of sale in writing, and this is said by the highest authorities to be indispensable.—3 Kent's Com. 130; 1 Mason's R. 138; Ib. 317; 2 ib. 435; 4 ib. 391. Our laws in relation to the registration of mortgages do not apply.

7. The issue was improper and immaterial. The court should not have rendered judgment on the verdict, but should have awarded a repleader.—4 Ala. 475; 5 ib. 770; 6 ib. 35.

P. Hamilton, *contra*:

1. The question to and answer by Beverly was competent testimony, under the rule that what is said in explanation of his possession by the holder of personal property is admissible evidence.—17 Ala. 10-118-220-316-366; 8 ib. 650; 10 Ser. & R. 426-7; 4 Ala. 42; 10 ib. 359-430; 3 Car. & Payne, 395, (14 En. C. L. 366;) 4 Pick. 378; 2 Phil. Ev. (C. & H. Notes,) 601-2-3-592; 2 ib., 177-8.

2. For the same reason, the letters of Johnson, under date of 17th and 22d March, 1849, to the master of the Brig, were admissible; they were facts of ownership, exercised by Johnson before the levy, or claim; directions given to the agent in possession, and obeyed by that agent. Acts of ownership may be proved.—10 Ser. & R. 426-7. Letters by the agent would have been admissible.—3 Dallas' R. 39.

3. Proof of acts of ownership by Johnson, after the date of the levy and claim, is more than the plaintiff in execution could be required to make. Surely making a stronger case than was required of him, is no error.—5 Pick. 410.

4. Evidence of Johnson's admissions and statements as to the title to the Brig was properly excluded. Statements as to title do not fall within the rule as to explanation of the possession.—17 Ala. 316-813; 10 ib. 358-430; 8 ib. 650, and authorities *supra*.

5. The bill of sale from Heirn & Le Baron bears date after the levy. It did not support the issue. The form of issue was not objected to. The levy of plaintiffs' attachment gave them a

lien on the Brig, and that could not be divested by any title originating after that date.

6. The charges of the court assert that Johnson's contract, in February, 1849, with Heirn & Le Baron, and his possession under it, gave him a right that could be levied on, and that at most his transfer to claimants, not being accompanied by the possession, nor being recorded, gave no right as against an attaching creditor. No bill of sale was necessary, in this case, to give Johnson a title to the Brig.—12 Mass. 57; 16 ib. 340; 16 Pick. 406; 8 ib. 86; 15 Johns. 302; 18 Johns. 169; Anthon's R. 121. Johnson did not put Fontaine & Dent in possession; his own possession remained undisturbed during the whole time the vessel remained in this country. If he did any thing at all, which could affect the right of the creditor, he mortgaged the vessel to Fontaine & Dent. But the same was never recorded, and no proof of notice to Beers & Smith was made. Under the authorities last cited, and those quoted by Mr. Jones, as against Beers & Smith, no title passed to Fontaine & Dent.

The testimony in the case shows, that whatever advance of money the claimants, Fontaine & Dent, may have made for Johnson, they had been entirely repaid before the trial, by Johnson; their lien or claim on or to the Brig was therefore extinguished and satisfied. This testimony was received without objection. No injury, therefore, has been sustained by Fontaine & Dent. Were the record full of error, they have not been harmed. In such case, this court should not reverse.

In trial of right of property, claimant must rest on his own title, and cannot interpose the title of a third party.—15 Ala. 292; 16 ib. 192. Therefore, no matter what the title of Heirn & Le Baron to the Brig, Fontaine & Dent cannot rely on it. The possession was with Johnson, and that by contract with Heirn & Le Baron; as to all other parties, the title was in Johnson.

CHILTON, J.—1. The first exception, on the part of the claimants, was to the admission in evidence of the declarations of Beverly, made to the officer who levied the attachment upon the Brig, at the time of the levy. Said Beverly, upon being asked by the officer if the captain was on board, replied, "*that the captain was not on board, but that he (Beverly) was mate of the*

Brig; that the Brig belonged to George H. Johnson; that he held possession of the Brig for said Johnson, and was employed by him." The bill of exceptions states that "the claimants moved the court to exclude this evidence from the jury; but the motion was overruled."

The authorities, generally, agree that the declarations of one in possession of either real or personal property, explanatory of the possession, may be received as evidence, since they constitute part of the *res gestæ;* but declarations explanatory of *past* transactions, or as to the mode in which title was acquired or is held by a third person, not explanatory of the possession, are disallowed. According to this rule, a portion of the proof which the court was asked to exclude was indisputably legal, and if it were conceded that other portions were not, still as the objection applied to the whole, the court properly overruled the motion to exclude it. It is settled, that it is not the duty of the court, in such case, to distinguish and separate that portion which is legal from that which is not; but it may refuse such general motion to exclude the whole.—Borland v. Walker et al., 7 Ala. 269; Donnell v. Jones, 13 ib. 490. It is unnecessary, therefore, for us to criticise this evidence and to decide what portion, if any of it, was illegal.

2. There was no error in allowing the defendant in error to prove the directions given by Johnson to the captain of the vessel, under which the latter acted. These directions, coupled with the acts in compliance with them, were parts of the thing done, and explanatory of it, and tended to show the control and management of the vessel by Johnson before the levy, and to raise the presumption of ownership.

3. But we are unable to perceive what legitimate influence the proof of directions given by him *after* the levy was made, and the vessel had been replevied by the interposition of the claim, could have *upon the matter in issue.* The claimants, after they had entered into bond for the trial of the right of property, and the Brig had been delivered to them, had the right to place her in the possession of any person they pleased. The vessel was in the custody of the law. The claimants and their sureties on the delivery bond were bound for her forthcoming, in the event of a judgment of condemnation, and nothing said by the defendant in execution, or done by him, except in the

presence of the claimants, and by their assent, express or implied, could properly be received to invalidate their claim. They had the right to continue the vessel in her accustomed employment, and under the same direction to which she had formerly been subjected, without being put to the alternative of explaining the circumstances of the subsequent possession, or having an inference drawn from it prejudicial to them. We are not prepared to say, however, that under a proper issue, this evidence, if offered in connection with proof that the claimants held a lien merely for their indemnity, which lien had been discharged by Johnson since the claim was put in, would have been irrelevant. Such acts of ownership would tend to show the discharge of the lien, and that the property had re-vested in Johnson.

4. As the plaintiff in the attachment seeks to condemn the interest of Johnson in the vessel, it is very clear that his (Johnson's) declarations or admissions, while he was in possession of the Brig, made after his purchase and before the levy, in disparagement of his title or interest, are proper testimony.—1 Greenl. Ev., § 190.

5. The reasons for the exclusion of the bill of sale from Heirn to Fontaine & Dent are not set forth; but we take it for granted the court was of opinion, that the same, having been executed subsequent to the levy of the attachment, could not be received to affect the levy. Had the issue been properly made, the exclusion of this instrument would have been clearly erroneous. But the question being narrowed down by mispleading, to the liability of the Brig to the attachment *at the time of the levy*, the bill of sale, dated after the levy was made, was *prima facie* irrelevant, as it was outside of the issue. But the issue was clearly immaterial. Conceding that Johnson was the mortgagor, and that at the time the levy was made the law day had not arrived, when the mortgagee was entitled to the possession, then the interest of the mortgagor in possession was subject to levy; but it by means follows that the property must be condemned; for when the mortgagor makes default, and the mortgagee becomes entitled to the possession after the levy, the latter may claim the property and terminate the sheriff's possession.—McGehee v. Carpenter, 4 Ala. 475, and cases cited.

6. If, however, the levy was properly made, and the mortgagee acquires a subsequent right to possession, by the mortga-

gor's default of payment, and asserts his claim under the statute, this intervening claim cannot prevent a condemnation of the property, if the mortgagor before the trial wipes out the default by the full discharge of the mortgage debt. The full satisfaction of the demand which constituted the lien destroyed the lien, and left the claim without foundation.

7. But it is insisted that Johnson's title must be regarded as absolute, since the bond which he held for title to the Brig, and which he transferred to his securities, who are the claimants, was never recorded; that if it was designed to operate as a mortgage, it should have been recorded as the statutes require deeds of trust and mortgages. In reply to this, we feel no hesitation in holding that the statutes above referred to were never designed to apply to the transfer of vessels for the navigation of the ocean. These transfers are subject to marine regulations of a different character; and the object of the statutes, which was to furnish evidence of title, and give notice to creditors and purchasers, could not be effected by registering the trust deed in any particular county, since the vessel continually changes her locality, as the interest or caprice of her owners may suggest. The evidence of title is to be looked for in the ship's papers, and her registration according to the laws of Congress. Possession and acts of ownership will, in this as in other cases of property, be presumptive evidence of ownership, (4 East. 130, cited 3 Kent's Com. 130,) but are not conclusive.

8. It is insisted, further, that the vessel could not pass from Heirn & Le Baron to Johnson without a bill of sale, so as to vest in him a title subject to be seized on attachment. The rule generally recognized seems to hold that a writing is required to pass the title to a ship. We are not disposed to gainsay this rule, as to the evidence of ownership required to determine the national character of the vessel; but as between the vendor and purchaser, a parol sale consummated by the delivery of the ship will be good.—3 Kent, 130; 16 Mass. 336; 7 Johns. 308; 16 Pick. 406; 12 Mass. 57; 18 Johns. 169. Assuming the facts stated in the record, respecting the purchase by Johnson of Heirn & Le Baron, to be true, let us suppose that Johnson had paid them in full for the vessel before it was levied on, which would of course have discharged their lien on the ship for the purchase money, could they have sued Johnson, notwithstanding,

and have recovered the vessel from him? He has purchased and paid for it, and the same has been delivered to him under the contract. Now although he has no bill of sale, we think the want of this written evidence, as between the parties, would be disregarded by the court, and it would be considered that Johnson was the owner, although he wanted the usual, but not the indispensable evidence of ownership, so far as the defence of such action would be concerned. The fact that the bond was given, showing the vendor's lien, which lien had been discharged, would make no difference. The same result would follow, if the sureties of Johnson paid the purchase money, which the latter has since fully repaid to them. The fact that the bill of sale was given to the claimants, while a lien in their favor existed, does not work a divestiture of Johnson's title, if he has discharged the debt which the bill of sale was given to secure. There was proof of such payment by him, but the case in the court below was not made to turn on that question. We are not allowed, in the present condition of the record, to treat such payment as a fact found by the jury, and consequently cannot take it for granted, so as to prevent a reversal, upon the ground that the errors worked no injury; *non constat*, the jury may find otherwise.

This statement of our views, without further comment, will enable the court below properly to dispose of the case, after allowing the issue to be reformed, so as to correspond with the directions in The Planters' & Merchants' Bank v. Willis & Co., 5 Ala. 770.

Let the judgment be reversed and the cause remanded.

DRANE *vs.* GUNTER.

1. When no provision is made in the deed for the resignation of the trustee therein appointed, there are but two ways in which the trustee can resign his trust after having once accepted it, viz., in the summary manner pointed out in the statute, (Clay's Dig. 581,) or by the permission of a Court of Chancery.

2. An instrument in writing executed by the trustee, purporting to be a resignation of his trust and a transfer of the trust estate to another person, as trustee, with the consent and approbation of the *cestuis que trust*, creates no vacancy in the trusteeship until ratified by the court, when the deed confers no such power on the trustee.

ERROR to the Chancery Court of Lowndes. Tried before the Hon. J. W. Lesesne.

JUDGE, for plaintiff in error.

J. B. STONE, *contra*.

COLEMAN, J.—Walter Drane and Louisa Collins, and her four infant children, by W. Drane, as their next friend, filed the bill in this case, alleging that one Wiley Collins, the husband of said Louisa, and father of the four children, had executed and delivered to the defendant a deed, whereby he conveyed to defendant certain negroes and personal property in trust for said Louisa and her children, for whose use and benefit the defendant was authorized and required by the deed to take possession of, manage and control the property; that the defendant executed the deed, accepted the trusts therein, and acted as trustee for some months; that in December, 1845, defendant, at the request of said Louisa, by an instrument of writing, declared his resignation of said trust, and transferred the trust property to Drane; that defendant had ceased to act as trustee, and that Drane had taken possession of the property, and was performing all the duties of trustee; that defendant had declined to act in the said trust and was desirous to be discharged therefrom, but because no power is reserved in the deed for the appointment of a new trustee, and the discharge of defendant from said trusts, the complainants ask the court to appoint Drane trustee in the place of Gunter, and that he be discharged from the trusts of the deed. The defendant admits the execution of the deed, and that he accepted the trust, &c., and that in December, 1845, he signed said instrument of writing, but insists that in signing the same he did not intend, and did not understand, that he thereby authorized the appointment of Drane as trustee in his stead; that Drane procured the execution of said instrument by deceiving the defendant, and misrepresenting to him the object and

effect thereof. He denies that he has ever refused, failed or declined to act as trustee, or that he is desirous to be discharged from the duties thereof, and avers his entire willingness to execute the trusts of the deed; that he has the trust property in his possession and under his management; that the said Wiley Collins and the said Louisa, (who is the sister of the defendant) have become greatly dissatisfied with said Drane and his management of the property, and are anxious that defendant should continue to act as trustee, &c.

The special object of the bill seems to be to ask the court to appoint a new trustee, in the place of one who is willing to resign his trust.

There are but two ways by which a trustee can resign a trust like the one under consideration, after he has accepted it. One mode is by resignation in the summary mode pointed out by our statutes, and upon rendering a full and complete account of the estate. The other mode is by resignation by permission of a Court of Chancery, when the trustee should also be required to render a full account of the estate. The latter mode of proceeding has certainly not been taken away by the statute creating the former mode.

A trustee who has accepted a trust certainly has not the right to resign it at his pleasure to a court of equity. It is laid down in Hill on Trustees, (544,) that a trustee who has accepted the trust must not, capriciously and without reason, refuse to act, but that under certain circumstances he has a right to come to a court of equity to be relieved from the trust. In this case the defendant does not ask the court to be relieved from the trust; on the contrary, he asserts his entire willingness to execute the trusts, and resists the appointment of another trustee. The instrument of writing referred to, until ratified by the court, creates no vacancy in the trusteeship.

It is insisted that a case is made out for the removal of the defendant from the office of trustee. We fully recognize the doctrine that courts of equity not only hold trustees responsible for the proper execution of trusts, but will, for sufficient cause shown, remove old trustees and substitute new ones.—Story's Eq. Juris. § 1287. But the bill in this case is evidently not framed with the view of removing the defendant from the trusteeship. No ground of removal is alleged, and the question of

removal is not put in issue by the pleading. In no aspect of the case, as here presented, do we consider the court authorized to appoint Drane trustee, as sought by the bill.

The decree of the chancellor is therefore affirmed, and it is ordered that complainants' bill be dismissed without prejudice.

DOE EX DEM. KENNEDY *vs.* HOLMAN & HOWARD.

1. Under the statutes and rules of court regulating the action of ejectment in this State, a plaintiff may proceed for his costs and damages, after the premises have been recovered against him by an adversary plaintiff in another suit; consequently a plea *puis darrein continuance* of a recovery by a stranger is demurrable, if pleaded to the whole action, because it is no defence to the recovery of damages.
2. But a plea of a recovery by a stranger *puis darrein continuance* is no bar to a recovery of the premises; for the defendant, if not estopped from denying the plaintiff's title by some peculiar relation existing between them, may protect himself against a recovery by showing a superior outstanding title in a stranger; and if the plaintiff's title is superior, he ought not to be prevented from recovering against the defendant by reason of a recovery of the premises by one who would in turn become liable to him for damages upon entering into possession.

ERROR to the Circuit Court of Mobile. Tried before the Hon. John Bragg.

GEO. N. STEWART, for plaintiff in error.

No counsel, *contra*.

CHILTON, J.—The plaintiff in error brought an action of ejectment to recover a lot of ground in the city of Mobile. The declaration and notice having been served on Lewis and Otis, tenants in possession, and they failing to appear, at the Fall Term of the Circuit Court, 1841, the plaintiff took judgment by default against the casual ejector, and a writ of *habere facias*,

&c., was issued, and the representatives of the lessor of the plaintiff were put in possession by the sheriff.

At the Spring Term, 1842, Oliver Holman and Agnes Howard moved the court to be restored to possession of the *locus in quo*, and exhibited affidavits showing that they had been turned out of possession by the writ so executed by the sheriff, that they had no notice, &c., and propounding their interest as heirs of Abner Holman, they prayed to be admitted to defend. The Circuit Court rejected their application, and upon their writ of error to this court, the judgment was reversed. At the Spring Term, 1843, the cause having been remanded, the Circuit Court made an order allowing the said Holman and Howard to come in and defend, and thereupon they entered into the usual consent rule, and pleaded not guilty. After a verdict for the plaintiff, and a new trial, at the April Term, 1848, the said Holman and Howard, by leave of the court, filed their plea, setting forth "that since the last continuance of this cause, viz., on the 28th day of December, 1847, the President, Directors and Company of the Bank of Norfolk, a company incorporated and residing in the State of Massachusetts, obtained a judgment in ejectment, for a moiety of the premises, in the Circuit Court of the United States for the 9th Judicial District, in which suit the lessees of the said Howard became parties as tenants in possession. And the said ejectment was brought upon a mortgage held by the said bank upon the said property, which mortgage was given prior to the possession of the said defendants by a party claiming to hold title from their ancestors, and which was paramount to their claim of title, and the said suit was an adversary suit. And the said Holman and Howard further show and allege, that at the —— Term of the Court of Chancery for the First Chancery District, in a suit to foreclose the said mortgage, upon a bill filed by the said bank, wherein the said Holman and Howard were prayed to be made defendants, such proceedings were had, that by the decree of the said court, the premises were declared to be subject to the said mortgage debt, which decree was afterwards, viz., at the —— Term of the Supreme Court, affirmed, and by the final decree of the said Chancery Court, made since the last continuance, it was ordered that the former orders and decrees be carried into effect. And the said bank have taken possession of the entire premises under the title afore-

said, and the defendants are no longer in the possession. And the said bank are not, nor have they ever held a title, in privity with that of these defendants, nor with the possession of Lewis and Otis; which these defendants are ready to verify, wherefore they pray judgment whether they ought to be further compelled to answer the said suit, and that the same may be quashed."

To the foregoing plea the plaintiff demurred, which demurrer was overruled. He then replied that he had no notice of the said mortgage and recovery in ejectment, as set forth in the plea, &c. To this replication the defendants demurred, and the court sustained the demurrer.

The plaintiff declining to proceed further, the court gave judgment that the defendants go hence and recover their costs, &c.

The legal sufficiency of this plea is the question to be decided.

It is laid down in Comyn, that if land be recovered by a stranger pending the writ, it thereby abates; but if the recovery was not against the defendant, but a stranger, it is no plea; so if it was by collusion; so, also, if the tenant enfeeff another pending the writ, and afterwards disseize his feoffee, who recovers against him, such recovery does not abate the writ; nor will a recovery by *nil dicit* have this effect, if the judgment of recovery was upon a writ brought after the first writ was purchased; nor a recovery by render or default.—Comyn's Dig. tit. Abatement, H. 54, 1, 2.

The same author, speaking of the form of the plea, says "that if a recovery be pleaded, it ought to be pleaded that execution is also sued." We have been unable to obtain the old authorities to which he refers, so as to ascertain whether the rule stated by him applies solely to real actions, or is extended so as embrace the mixed action of ejectment. The only American case referred to by the editor of Comyn is Walcutt v. Spencer, (14 Mass. 409,) where the court, per Jackson, J., recognize the rule stated by Comyn as applicable to writs of entry at common law. There is much reason in holding that in a writ of entry, where the defendant is commanded either to deliver seizin of the land to the demandant, or show cause why he will not, to allow him to set up in abatement of the writ that he cannot comply with its mandate, since he has, *puis darrein continuance*, been ousted by title paramount to his, or evicted by an adversary judicial proceeding. The tenant in such case ceases wrongfully to with-

hold the possession of the land from the demandant. He is driven from the contest by title paramount, or by the execution of the sentence of the law, and being dispossessed, he cannot render the possession to the demandant, though the court should so adjudge. But we are unable to perceive any reason or propriety in applying such a rule to the action of ejectment, as the same obtains under our law. According to our statute, when the action of ejectment is brought, the jury are required to assess the damages in favor of the real plaintiff, as in actions of trespass to try titles, (Clay's Dig. 320, § 46,) and by rules of this court, adopted in 1842, the mode of proceeding where there are several actions pending for the same premises is pointed out. Clay's Dig. 611, § 25-6-7. By the provisions of the 26th sec- above referred to, where several actions of ejectment have been commenced for the same premises on the demises of different lessors, it may be lawful for the plaintiff in either of the cases, during the pendency of his suit, to serve a copy of his declaration on the lessors of the plaintiff, or his attorney, in the other case or cases, with a notice of the pendency of his action, and to require him or them to defend against the same; and in the event of the recovery by the plaintiff giving the notice, it shall not be lawful for the plaintiff notified as aforesaid to proceed in the action for the recovery of the tenements sued for, but only for cost and damages; provided that sixty days notice shall be given, before the said plaintiff shall be required to join the consent rule. So that, according to this rule, although a plaintiff may fail with an adversary plaintiff to recover the land, and the same may be recovered against him, he may nevertheless proceed for his cost and damages. In the plea under consideration, it is not averred that the title upon which the Bank of Norfolk recovered is paramount to that of the plaintiff; and if we concede that the change of the possession by judicial sentence *puis darrein continuance* would be an answer to the ejectment as to the land sought to be recovered, since it may have been had upon a title inferior to that of the plaintiff in this action, it would constitute no defence as to the damages which the plaintiff may have sustained by the wrongful occupancy of the land by the defendants. The plea, however, goes to the whole action.

But we do not think it good for any purpose. If the title of the bank be superior to that of the plaintiff in this action, the

defendants, being tenants in possession, and not estopped by the existence of any peculiar relation which they bear to the plaintiff's title, may set up that superior outstanding title to defeat the recovery. It is thus they may protect themselves against liability to damages to any one but the true owner of the premises. But we confess that we are unable to discover upon what principle, founded in justice or legal right, the defendants may exonerate themselves from liability to damages to the true owner, for their unlawful detention of the premises from him, by reason of a recovery of the premises from them by one, who, in turn, would become liable to pay damages upon entering into possession. This hypothesis is not inconsistent with the plea which was demurred to, and shows, we think, that it cannot be supported.

Upon the whole, we are of opinion that the plaintiff should be permitted to try his title, and if the bank, or any one else in possession when this suit was instituted, claims superior right, the rules governing this action, as declared by the several statutes and the rules of court above referred to, and recognized by this court in Howard & Holman v. Kennedy's Executors, (4 Ala. 592,) furnish a clear remedy for asserting and maintaining that right.

The judgment is reversed and the cause remanded.

DARGAN, C. J., not sitting.

STEWART GEORGE *vs.* SKEATES & CO.

1. The courts will not construe a prior act to be repealed by a subsequent one, in the absence of express words of repeal, unless the provisions of the subsequent act are directly repugnant to the former; but when such repugnancy exists, the latter must prevail, and consequently the former is repealed to the extent that the provisions of the two acts are inconsistent with each other.
2. The act of 1826, (Clay's Dig. 139, § 22,) which required that all liens upon steam-boats and other water-crafts for materials, labor or stores furnished them, should be enforced *on or before the first day of July*

then next ensuing, is repealed by the act of 1848, (Pamphlet Acts, 146,) which requires such levies to be enforced *within six months from the time of their creation.*

3. When a boat is seized under a libel of which the court issuing it has jurisdiction, all persons having liens upon the boat may intervene by petition, without regard to the amount of their claims.
4. Whether the claimant can raise the objection that the boat was not in the possession of the sheriff, nor within the control of the court, after joining issue upon the merits of the libel without an exceptive allegation to the jurisdiction of the court—QUERE?
5. When the record shows that the boat was actually sold under the order of the court, and that the proceeds were in the hands of the sheriff, it is too late to raise the objection for the first time that the court did not have the possession or control of the vessel.

ERROR to the City Court of Mobile. Tried before the Hon. Alex. McKinstry.

PITMAN SAUNDERS filed a libel in the City Court of Mobile against the steamboat Arkansas, No. 5, on the 1st July, 1850, to recover for damages done to cotton in its transportation from Wetumpka to Mobile. The sheriff took possession of the boat under a writ of seizure issued on the libel, and delivered her up to Wainright & Twelves who entered into bond, by which they stipulated to pay whatever judgment might be rendered on the libel. Afterwards they re-delivered her to the sheriff, and he returned the writ of seizure, showing all these facts in his return. Skeates & Co. filed their petition in the court, setting forth the proceedings which had been had on the libel, and claiming a lien upon the boat for materials and labor furnished her within the six months last preceding the filing of the petition, to the amount of $21 90. Other creditors of the boat also filed their petitions claiming liens on her for materials, work and labor.

Stewart George afterwards filed his answer to the libel, claiming to be the owner of the boat. The answer contains a demurrer to the libel, and a plea to the jurisdiction of the court, because the bill of lading showed that the cotton was to be shipped from Wetumpka to New Orleans, a place without the jurisdiction of the court. The claimant also denies the justice and correctness of the accounts which had been filed against the boat, and requires strict proof of them. At the August Term of the court, judgment was rendered, overruling the demurrer

and the plea to the jurisdiction; and after proof had been made of the accounts, a judgment was rendered in favor of the libellant for $165 34, and also in favor of Skeates & Co. for $21 90. At the same time an order was made "that the sheriff sell the said steam-boat, her tackle, apparel and furniture, and bring the proceeds into court for distribution pursuant to the statute;" and the sale was afterwards made accordingly, and the proceeds brought into court.

GIBBONS, for plaintiff in error:

1. The petition does not allege that the account of Skeates & Co. accrued since the first day of July last preceding, as required by the statute, (Clay's Dig. 139, § 22.) On the contrary, the petition itself and the exhibit thereto show that the account accrued previous to that day. The act of 1848 only repeals the first section of the act of 1836.

2. The claim is for less than fifty dollars, and there being no libel in court to which the petition could attach, the petition should have been dismissed for want of jurisdiction, if for no other reason; as even consent cannot give jurisdiction.

3. The court had no jurisdiction to decree a sale of the boat. The bond taken from Wainright & Twelves discharged the boat entirely from all further claims, and the bond stood in lieu of it. Richardson v. Cleaveland & Huggins, 5 Por. 251. The law of 1836, under which the bond was taken, is still in force, and the bond is good.—14 Ala. 727; 2 ib. 667; 9 Por. 111. As to what is a legal possession in Admiralty, see 1 Paine's C. C. R. 620. There is no necessity of pleading to the jurisdiction, when the want of jurisdiction is already apparent from the record.—1 Mason, 360. A plea is unnecessary, when it informs the court of no new fact. Inferior courts of special, limited jurisdiction, must have their jurisdiction shown upon the face of their proceedings, or their judgments and decrees are nullities.—5 Cranch, 174; 6 Wheat. 450; 9 ib. 541; 2 Cranch, 9; Ib. 126; 3 ib. 515. In the present case, the record shows that the boat was not in the custody of the law at all.

HAMILTON, *contra:*

1. There was no demurrer to the petitions. The answer of George makes no objection to the petition, other than calling for

proof. An answer to the demurrer to the original libel is to be found in the statute.—Pamph. Acts, 1845, 24; Clay's Dig. 139, § 24.

2. The court had jurisdiction of the petition. The averments are insufficient.

When applications by petition are proper.—Dunl. Adm. 129.

The amount of the claim is no objection. The boat was in the custody of the City Court, and the petitioners of necessity followed her into that court; for a sale by order of that court would have vested the boat in the purchaser, free of petitioner's lien.

Exceptions to the jurisdiction must be presented in *propria persona*, and under oath.—Dunl. Adm. Pr. 199-200.

There is no error in the proceedings of the court, in ordering a sale of the boat. The court was lawfully in the possession of the boat, and any irregularities, if such ever existed, are cured by the appearance and pleas to the libel, filed by the defendant George.—1 Mason, 100; 2 Ala. 738; 3 Dall. 87; 3 Ala. 32; Ware's R. 367; 1 Gallis. 75; 9 Por. 180; 9 Wheat. 400.

DARGAN, C. J.—It is insisted that the court erred in rendering a decree in favor of the defendants in error, for the reason that the allegations of their petition do not show that the materials and labor were furnished for the use of the boat, subsequent to the first day of July preceding the filing of the petition. The act of 1836 required that all liens upon steam-boats and other water crafts, which arose by furnishing such boats with materials, labor or stores, should be enforced on or before the first day of July then next ensuing, and if not enforced on or before that day, such liens should cease to exist.—See Clay's Dig. 139. But by the act of the 3d of February, 1848, it is enacted, that all liens upon steam-boats for furnishing materials, labor or stores, shall cease to exist, unless the same shall be enforced within six months after such materials, labor or stores, shall have been furnished. It was the manifest intention of the Legislature to allow to all who might have liens upon boats, six months within which to enforce them; and this intention, which we must carry out, is directly repugnant to that portion of the act of 1836 requiring such liens to be enforced on or before the first day of July next following the furnishing of the materials,

labor or stores, whereby the liens arose. Under the act of 1836, some creditors might have nearly a year within which to enforce their liens, whilst others might have but a few days. This is plainly repugnant to the intention of the act of 1848, which allows to all six months, and six months only, within which their liens must be enforced; and as the intention of the act of 1848 is plainly repugnant to that portion of the act of 1836 to which we have referred, we must give effect to the act of 1848, at the expense of the act of 1836. It is true that courts will not construe a prior act to be repealed by a subsequent one, in the absence of express words of repeal, unless the provisions of the subsequent act are directly repugnant to the former. But when such repugnancy exists, the latter must prevail, and the consequence is, that the former is repealed to the extent that the provisions of the two acts are inconsistent with each other. As the act of 1848 allows all six months within which to enforce their liens, it necessarily repeals so much of the act of 1836 as requires such liens to be enforced on or before the first day of July next ensuing their creation. The petition in this case shows that the materials and labor were furnished within six months previous to its being filed; it therefore shows a lien on the boat for the satisfaction of the claim.

It is also objected, that the court did not have jurisdiction of the amount claimed in the petition, it being for twenty-one dollars $\frac{99}{100}$. It must be admitted that the petitioners could not have filed an original libel in the City Court of Mobile for an amount less than fifty dollars; for all sums under this amount are exclusively within the jurisdiction of a justice of the peace, whether the remedy be sought according to the forms of the common law courts, or the courts of admiralty; yet we think that when a boat is seized under a libel, of which the City Court has jurisdiction, we should then allow all to intervene by way of petition, without regard to the amount of their claims; otherwise those claiming sums under fifty dollars would be without remedy, for the boat being in the custody of the law, the justice could not proceed against it, or its proceeds when sold. And if the court, having the possession of the boat, could not take cognizance of such claims, in the administration of the proceeds of the boat, the parties would lose their liens, and have to look to the personal responsibility of the owners alone. The correct rule I

conceive to be this: whenever a court has the possession of the *rem*, or its proceeds, it will do justice to all who have claims upon it, without regard to the magnitude of their claims, for having jurisdiction over the *rem* and the right to order its sale, the court will not pay the proceeds to one not entitled to receive them.

It is again contended, that the court did not have possession of the boat, and therefore the decree of condemnation rendered on the libel of Pitman Saunders, as well as the decree upon the petition of the defendants in error, is erroneous. The return of the sheriff to the process of seizure issued upon the libel of Saunders shows that he took the boat into his possession, and that the master gave bond and security, the condition of which was to pay and satisfy such decree as should be rendered on the libel. Afterwards the sheriff made an amended return, which shows that the stipulators had re-delivered the boat to him, and that he had her in his possession. Upon these facts, it is insisted that the bond executed by the stipulators discharged the boat not only from the lien of Saunders, but also from the custody of the law; consequently the boat was not in the possession or under the control of the court at the time the petition of intervention was filed. And, not being in the possession of the court, it was without jurisdiction over the subject matter, out of which the claim of the defendants in error is sought to be satisfied. The petition, however, alleges that the boat was in the custody of the sheriff, and within the jurisdiction of the court, and these facts are not denied by the answer of the claimant; he only puts in issue the justice of the demand, but makes no objection to the jurisdiction of the court, founded on the fact that the boat was not in the possession of the sheriff, or within the control of the court. It may be well doubted, whether the claimant can raise this objection, after joining issue upon the merits of the libel, without an exceptive allegation to the jurisdiction of the court.—See Reed v. Owen & Martin, 9 Por. 180; 2 Ala. 738; 9 Wheat. 400. But be this as it may, as the record shows that the boat was actually sold under the order of the court, and that the proceeds were in the hands of the sheriff, we think it too late for the claimant to object that the boat was not in the legal custody of the court at the time the petition was filed. In the case of The Schooner Balina, 1 Gallis. 75, it was urged that it

did nor appear that the schooner and cargo ever were in the custody of the officers of the court, and consequently the court was without jurisdiction, but the record showed in that case, (as it does in the case before us,) that the vessel and cargo *had actually been sold* by the order of the court. This was held sufficient to show the jurisdiction of the court. Indeed, I can see no ground on which a valid objection can be made to the jurisdiction of the court, for want of the possession or legal custody of the *rem*, when it is shown that it has has been sold by the order of the court, and the proceeds of such sale are brought into the possession or under the control of the court. It is then too late to object, for the first time, that the court did not have the possession or control of the vessel.

Upon the whole, we perceive no error in the decree, and it must be affirmed.

STEWART GEORGE *vs.* SAUNDERS ET ALS.

1. In an admiralty proceeding by libel against a steamboat, after the vessel has been sold under an order of court, and the proceeds of the sale brought into court for distribution, the refusal of the court to order the proceeds to be paid to the claimant of the boat is not such a final judgment as will authorize an appeal or writ of error.

ERROR to the City Court of Mobile. Tried before the Hon. Alexander McKinstry.

THIS case and the preceding one (Stewart George v. Skeates & Co.,) are parts of the same suit, and the record of the former case forms a part of the record in this. The record here further shows, that after the steamboat had been sold under the order of the court, and the proceeds of the sale brought into court for distribution, Stewart George, by his attorney, moved the court that the proceeds of the sale should be paid over to him, "on the ground that he was the owner of said boat, and that the decree ordering the sale of said boat was *coram non*

judice, and that the several intervenors and petitioners, not being rightfully in court, as libellants or petitioners, the several decrees rendered in favor of said petitioners and intervenors were nullities, and should be disregarded and set aside by the court." The court refused the application, and Stewart George craved an appeal from its decision.

GIBBONS, for plaintiff in error.

HAMILTON & JEWETT, *contra*.

CHILTON, J.—The case of Stewart George v. Skeates & Co. is decisive of this case on the merits, against the appellant; but we are satisfied that the refusal of the court to order the proceeds of the boat to be paid to the appellant, is not such a final judgment as authorizes an appeal, or writ of error. If a writ of error lies from this refusal, the party has two writs of error in the same cause, one from the refusal of the court to give him the money, another from the judgment of appropriation; in other words, one writ for the refusal of the court to act, another for acting as shown by the final judgment.

The writ of error must be dismissed.

PATTERSON *vs.* LEACHMAN.

1. A petition filed by a ward against his guardian's administrator, asking a settlement of his guardianship accounts, is demurrable, when it shows on its face that the guardian's estate has previously been settled as an insolvent estate.

ERROR to the Court of Probate of Greene.

THORNTON, for plaintiff in error:

This application was made under the act of 1845, (Pamphlet Acts, 166-7,) to ascertain the amount due from the guardian, so that the sureties might be sued on their bond, according to the

cases of Snedicor v. Carnes, (8 Ala. 655,) and Eiland v. Chandler, (ib. 783.) The object of the petition is not to get anything from the estate of the defendant's intestate, but simply a decree ascertaining the amount due the ward. The judgment would be, of course, for assets *quando acciderint*, and could not prejudice the rights of those creditors having precedence.

The declaration of insolvency was no bar to the application, and the demurrer should therefore have been overruled.—Dent v. Smith, 15 Ala. 291; Middleton's Adm'r v. Maul's Adm'r, 16 Ala. 481.

PIERCE, *contra:*

The demurrer was properly sustained. The settlement of the estate as an insolvent estate foreclosed all claims which were not presented according to the provisions of the statute.—Clay's Dig. 194, §§ 10, 11, 12; Middleton's Adm'r v. Maul's Adm'r, 16 Ala. 481. There is nothing stated in the petition which can exempt the plaintiff from the provisions of the statute. It does not state that the estate has become solvent, or that there is any surplus remaining in the hands of the administrator.

The case of Dent v. Smith, (15 Ala. 291,) does not meet this case. In that case there was a judgment against the representatives, which was levied on property that could not be treated by them as assets. The court only decided that the failure to present the claim did not extinguish the debt, if there should be any surplus after the payment of the debts filed.

COLEMAN, J.—In this case, the petition of Fleming Patterson sets forth, in substance, that in September, 1830, one James Yates was, by the Orphans' Court of Greene county, duly appointed his guardian, and as such received the sum of $250, the property of petitioner, of which he never made any return or settlement with said court; that said Yates died in 1837, about one year before the petitioner became of age; that thereupon one James A. Beal was duly appointed administrator of said Yates, and afterwards, in 1841, settled up the estate of said Yates, as insolvent, without paying said debt.

The petition further states, that about a year previous to the filing thereof one Robert Leachman had been appointed administrator "*de bonis non*" of said Yates, and prays that a citation be directed to said Leachman, administrator as aforesaid, re-

quiring him duly to appear before said Probate Court, and file his accounts and vouchers for a final settlement of the guardianship of the said James Yates, deceased.

To this petition the defendant filed a demurrer, which raises the question whether the settlement of the estate of said Yates as insolvent, by said Beal as his administrator, in 1841, as set forth in the petition, is a bar to the plaintiff's suit in this case.

In Edwards v. Gibbs, Judge, &c., 11 Ala. 292, it was decided, "That a suit cannot be maintained against an executor who has declared an estate insolvent, upon his official bond, assigning as a breach, that he had not made a full inventory of the assets." The settlement of the estate as insolvent, was made in that case, as in the one under consideration, under the act of 1806, which declares "That if any creditor shall not make out his claim with the commissioners, within the time of their commission, or before referees, or at common law, in the manner this act provides, he shall be forever barred of his debt, or demand, unless such creditor shall find other estate of the deceased, not inventoried by the executor or administrator, before distribution."—Aikin's Dig. 153. The petition in this case shows that the estate of Yates was settled up, in the year 1841, as insolvent, and alleges nothing to bring the case within the exceptions in the statute. The petition is clearly insufficient, and the demurrer was properly sustained by the court.

Let the judgment be affirmed.

COMBY ET ALS. *vs.* McMICHAEL ET ALS.

1. When the objects of a trust are fully performed, the title of the trustee ceases, and the legal as well as the equitable title vests in the beneficial owner, unless the intention of the grantor that the legal title should continue in the trustee clearly appears.
2. When parties have a joint legal title to personal property, an equity existing between themselves will not enable them as complainants to file a bill in chancery, to redress an injury done to their joint legal title.

3. A *feme sole* conveyed her undivided interest in certain personal property, which had been bequeathed to her and her brothers and sisters by their father, to a trustee, in trust that he should take the same into his possession when divided, and hold it for the use and benefit of herself and the issue of her body, and at her death should convey the same to such of her issue as might then be living. She afterwards married, and her portion of the slaves after division went into the possession of her husband. After her death her children filed a bill for the recovery of the slaves, against their father and others claiming under him. *It was held,*

1. That the complainants' title, if they had any at all, was a legal title for which they had a perfect legal remedy.
2. That the prayer for a division of the slaves among the complainants did not give the court jurisdiction to render a decree against the defendants.

ERROR to the Chancery Court of Benton. Tried before the Hon. D. G. Ligon.

J. B. MARTIN, for plaintiffs in error:

The court of chancery has jurisdiction in this case. There is a trust shown, which remains unexecuted, and the trustee being dead, the court will appoint another in his stead, if nothing more.—2 Hen. & Mun. 11; 4 Hayw. 4; 9 Cow. 524; 2 Eng. Com. Law R. 409; 9 Ala. 999. The legal title being in the trustee, the remedy of the *cestuis que trust* is only in equity.—17 Ala. 636; Ib. 743.

The bill charges that the trust property is being wasted, that defendant asserts an absolute title to the property, that he has sold one of the negroes, and disposed of the remainder, all which allegations are admitted in the answers and are sufficient to give the court jurisdiction.—5 Ala. 523. Again, the property is in the possession of several persons.

The deed in this case vests the estate in, and is a settlement in favor of the children of the donor, retaining the use and enjoyment only to herself and children during her life, which, when executed and delivered, became irrevocable.—4 Ala. 350; 10 ib. 819; 14 ib. 437; 17 ib. 214.

The main question arises upon the construction of the deed. Does it create an estate tail in the mother of complainants? Wherever there is an apparent intention to use the terms "heirs," "issue," &c., in their natural sense, that construction will be

given to them.—6 Browns P. R. 309; 1 Term R. 593; 2 Roper on Leg. 355; Fearne on Rem. 184, Note; 17 Ala. 62; 12 ib. 135; 9 ib. 1003.

The entire clause, when taken together, clearly shows that by the term "issue" the donor meant and intended children, and that such as she might have living at the time of her death should take the absolute estate. 1. Because such is the language of the deed itself. 2. Because it is a marriage settlement. 3. Because it is consistent with the manner in which the persons by whom the property was to be enjoyed, and the person by whom the property was to be conveyed.—1 Peere W. 452; 5 M. & S. 95-100; 2 Atk. 89; 3 Ves. 383; 7 ib. 522; 1 ib. 145; 17 Ala. 63; 12 ib. 135; 18 ib. 132; 9 ib. 1003; 1 Bay. (S. C.) 78; 1 Johns. 440; 16 ib. 434; 3 Marsh. 289; 1 Peere W. 663. According to the terms of the deed, the absolute estate must necessarily vest at the death of the donor, in the issue (i. e. children) which she might then have living; and if she died without issue, it was to revert back to her brothers and sisters, who are shown by the deed to have then been in existence. There is no pretence for saying that there is even a squinting at a perpetuity. The whole deed will be taken together, and if necessary, the word "or" will be construed "and."—2 Vez. 34; 8 East. 149; 15 ib. 389; 16 ib. 67; 3 Peere W. 258; 15 Ves. 476; 13 Serg. & R. 205; 5 Binney, 252; 7 Penn. 13; 9 Ala. 999.

Rice & Morgan, *contra:*

1. The death of the trustee does not give jurisdiction of such a bill to a court of chancery. There is nothing stated in the bill which confers jurisdiction. If complainants are entitled to relief any where, they must seek it in a court of law.—Colburn v. Broughton, 9 Ala. 351; Robinson v. Robinson, 11 ib. 947; State Bank v. Smith, 6 ib. 75; Watson v. Bothwell, 11 ib. 650.

2. The bill is multifarious. It seeks, among other things, a partition of the property, in which partition none of the defendants have an interest.—Meacham v. Williams, 9 Ala. 842.

3. The deed of Lucy S. Paulett, before her marriage, of which it is not pretended or alleged her husband had any notice before his marriage with her, is fraudulent and void as to him, and cannot defeat his marital rights. As to him, that deed is mere waste paper. The common law does not impart validity,

and no law of Georgia is alleged which made it valid.—Waller v. Armistead, 2 Leigh's R. 11; England v. Downs, 17 Eng. C. 522; 2 Beavan, 522; Linker v. Smith, 4 Wash. C. C. 224; Ball v. Montgomery, 2 Ves. jr. 191-94; Atherley on Mar. Set. 319; 1 Story's Eq. Ju., § 273.

4. The complainants have no right to the property under the deed, as against the husband, who is the defendant in this case. The limitation to them is void.

5. The bill contains no allegation that there was any law of Georgia giving validity to any such deed, as against a husband; nor does the bill allege or pretend that the husband at or before the marriage had notice of the deed, or that he ever assented to it since, but the contrary of all this is inferrable from the bill; and all intendments are against the pleader who filed the bill.

DARGAN, C. J.—Richard Paulett, who resided in the State of Georgia, being possessed of certain slaves, executed a deed, by which he conveyed them to his children, to be divided when his youngest child arrived at the age of fifteen years. Before the division took place, Lucy Smith Paulett, one of the daughters of the grantor, conveyed her undivided interest to her brother, Lewis Paulett, in trust, that he should take the same into his possession when divided, and retain it for her use and benefit, and for the use and benefit of the issue of her body, and *at her death convey* the same to such of her issue as should be *living at her death*. After the execution of the latter deed, Lucy Smith Paulett intermarried with William McMichael, by whom she had several children. The slaves were divided between the children of Richard Paulett, and Bob, Jinny and Maranda fell to the lot of Lucy. These slaves went into the possession of William McMichael, the husband, who sold Bob, but yet retains the possession of Maranda. Jinny, the other slave that fell to the lot of Lucy, is dead. William McMichael removed to the State of Alabama, and his wife died here; and this bill is filed by her children against William McMichael, their father, and others, to whom a portion of the slaves (being the issue of the females) were hired. The chancellor dismissed the bill, on the ground that the deed executed by Lucy to her brother in trust for her and her issue, created in her an estate tail, and consequently her husband, by virtue of his marriage, took the entire

right to the slaves, to the exclusion of her issue living at her death.

We entertain no doubt but that the decree, dismissing the bill, must be affirmed, without regard to the question whether the remainder over to the issue of Lucy S. Paulett be valid or not. For if it were admitted even that the chancellor was wrong in the construction of the deed, and that the children of Lucy, by virtue thereof, became entitled to the slaves after the death of their mother, still it is manifest that they have a perfect legal remedy; for their title would be a legal and not an equitable one, and there would be no impediment in the way of their suing at law. The general rule of law is, that when the objects of the trusts are fully performed, the title of the trustee ceases, and the legal, as well as the equitable title, will be vested in the beneficial owner, unless indeed it plainly appears that it was the intention of the grantor that the legal title should continue in the trustee, notwithstanding the trusts are fully executed. If the trusts be created by will, the courts will presume that the testator intended to give the trustee exactly that quantity of estate necessary to the completion of the trusts. It was on this principle that the case of Lord Saye & Seale v. Jones, 1 Eq. Cases, was decided; there lands were devised to trustees and their heirs to pay legacies and annuities, and then to pay the surplus rent into the proper hands of a married woman, and after her death to stand seized of the lands to the use of the heirs of her body. It was decreed that the trustees took the legal title during the life of the *feme covert*, but that after her death it vested in the heirs of her body.—See also, Robinson v. Gray, 9 East. 1; Hill on Trustees, 239.

It is true that courts are more cautious, when the trusts are created by deed, in restraining the title of the trustee to the mere purposes of the trusts, and will not cut down the title of the trustee to a life estate, or other less interest, in opposition to the language of the deed, merely because an estate in fee was unnecessary to the completion of the trusts.—Wykam v. Wykam, 18 Ves. 420-23; Hill on Trustees, 251. But where the instrument by which the trusts are created *clearly* contemplates that the title of the trustee shall cease upon the performance of the trusts, then the legal title must determine on the performance of the trusts; otherwise the trustee would take a larger estate than was intended by the grantor.

Applying this principle to the case before us, we entertain no doubt but that the title of the children of Mrs. McMicheal (if they have any at all) to the slaves in question, is purely a legal one. It is clear that the deed, by which the legal title was conveyed to the trustee, contemplates that his title should cease upon the death of Lucy S. Paulett, the mother of the complainants; for he is there directed by the deed to convey the slaves to her children then living. This clearly shows that it was not the intention of Lucy S. Paulett that the trustee should retain the legal title longer than she lived, but that it should cease at her death. Nor can it be insisted that the legal title remains in the trustee until he actually makes a written conveyance; for the subject of the trust being personal property, the legal title will pass to the *cestuis que trust* by the mere delivery of the property in pursuance of the trusts. Upon the marriage of William McMichael with Lucy S. Paulett, he became entitled to the estate reserved to her by the deed, and as he received the slaves into his possession, and held them until the death of his wife, the trust was completely executed, and the children of Lucy S., his wife, if entitled at all, then became entitled to the slaves, and could have maintained trover or detinue for them against any one who detained them; for the title of the trustee then ceased, and there was no need of an actual written conveyance to invest the children with this legal title.

But it is insisted, that the prayer for a division of the slaves amongst the complainants gives the court jurisdiction. But this cannot be. If we admit that equity will take jurisdiction to divide personal property amongst joint owners, this equity exists amongst the complainants themselves, and cannot convert their legal title against the defendants into an equitable one. Parties may have joint interests in property, and equities as between themselves, but this equity will not enable them as complainants to file a bill in equity to redress an injury done to their joint legal title. On this ground the bill must be dismissed.

Whether the plaintiffs have any title to the slaves even at law, that is, whether they can take the remainder created by this deed, or whether their mother became entitled to the absolute property, as the case now stands, we will not decide; for it is not absolutely necessary to the disposition of the case, and we should prefer to have that question re-argued before deciding it.

HARBINSON ET ALS. *vs.* HARRELL ET ALS.

1. When the mortgagor of personal property remains in the actual possession of the property before the law day, *his entire interest therein*, consisting of the usufruct of the property until the law day and the equity of redemption, may be sold under execution at law against him.
2. The plaintiffs in execution are entitled to precedence over a stranger to whom, after the levy, the mortgagor has given an order on the mortgagee, which has been accepted by the latter, to be paid out of the surplus fund after satisfying the mortgage debt.
3. The lien of the plaintiffs in execution is not affected by a sale of the property made by agreement between the mortgagor and the mortgagee, after the levy, and before the law day. In such case the plaintiffs would be entitled to recover the value of the hire of the property from the time of the sale until the law day, and to have an account taken of the value of the property on the law day.
4. When the mortgagees file a bill to separate their interest from that of the mortgagor, after the levy of an execution against the latter on the property, they cannot be allowed out of the mortgage fund reasonable solicitor's fees incurred by them in the prosecution of the suit.
5. A deed of mortgage may properly be admitted to record, on proof by the subscribing witness that he saw the same signed, sealed and delivered on the fourth day after its date. When it is not shown that any fraud was intended, nor that any injury was done, or attempted, by the wrong date, the probate will be held a substantial compliance with the statute, although it does not strictly accord with the form prescribed by it.
6. In taking an account of the mortgage fund after a sale of the property, the plaintiffs in execution cannot take advantage of usury in the mortgage debt.

ERROR to the Chancery Court of Lowndes. Tried before the Hon. J. W. Lesesne.

THE bill alleges that the complainants, Harbinson et als. became the securities for one John Powers, on two promissory notes executed by him to one George M. Reese, for borrowed money, dated on the 17th July, 1848, and due January 1, 1850, for the aggregate sum of $7,114 39; that to secure complainants against their liability on said notes, said Powers executed

to them a mortgage, or deed of trust, on certain lands and negroes, which was duly recorded in the proper office; that said mortgage stipulated that said Powers should retain the possession of all the mortgaged property until the maturity of the notes, and on default being made in the payment of the notes, complainants were authorized to take possession of all the property, and sell the same after giving thirty days notice. A few days after the execution of the mortgage, four several decrees were rendered in the Court of Probate of Lowndes, in favor of Martha P. Harrell, Mary R. Harrell, Joseph P. Harrell and Francis M. Harrell, against said John Powers, their late guardian. On these decrees several executions were issued, and placed in the hands of the sheriff, which were levied on sixteen of the mortgaged slaves.

The bill charges that the residue of the mortgaged property is insufficient to satisfy the mortgage debt, and that a sale of the slaves by the sheriff would cause irreparable loss and injury to complainants. It prays an injunction restraining all further proceedings under said executions; that the property levied on may be delivered up to complainants, on their indemnifying said plaintiffs in execution; that an account may be taken of the mortgage debt, and the property sold to satisfy said debt, charges, &c.

The answers of the defendants admit the execution of the mortgage, but they insist that it was intended to hinder, delay and defeat them in the collection of their judgments against said Powers, which were rendered only a few days after the execution of the mortgage. They object that the mortgage was not proved and recorded as required by the statute, and that it was not executed on the day of its date. They also state, that on December 21, 1848, (the day before the answers were filed,) complainants had sold the whole of the mortgaged property, on a credit of twelve months, which sale, they insist, was without authority, and renders complainants liable to them for the hire of the negroes from the time of sale until the 1st January, 1850, when the mortgage debt fell due, and for the excess of the proceeds of sale over and above the mortgage debt.

The defendants afterwards filed a cross-bill, praying that the sale might be set aside, and a re-sale had to satisfy their judgments; that said mortgage might be decreed null and void as to

them; and that complainants might be made to account with them. An amendment to the cross-bill brought in S. Gresham as a defendant thereto, alleging that he claimed an interest in the mortgage fund, under a written order executed to him, by said John Powers, after the levy of the plaintiff's execution, which order had been accepted by Harbinson et als., to be paid out of the mortgage fund after satisfying their debt. And a further amendment set up usury in the mortgage debt, and insisted that said mortgage, if valid at all, was good only for the amount of money actually borrowed from said Reese, with lawful interest thereon.

The mortgage bears date July 17, 1848, and in the certificate of probate, it is certified that the subscribing witness proved that he saw the same signed, sealed and delivered on the 21st July. In other respects the certificate is formal.

The decree of the chancellor, and the cross assignments of error, will be readily understood from the opinion.

Stone & Judge, for plaintiffs in error:

1. The record in this case clearly shows that the defendants were proceeding to sell, not the possessory interest of Powers in the slaves merely, but the entire property, on the alleged ground that the mortgage was fraudulent. In this state of the case, Harbinson et al. had a clear right to file their bill restraining the sale, and thus separate the mortgage from the possessory interest.—Williams v. Jones, 2 Ala. 314; Marriott & Hardesty v. Givens, 8 Ala. 694.

2. No effort has ever been made to realize the possessory interest, or make it available. The bills, answers and proof show that the defendants have all the while sought the entire property, on the alleged ground that the mortgage was fraudulent. They made no effort to obtain the possessory interest before the sale was made, although some two months had elapsed.

3. The decree of the chancellor is wrong, in charging plaintiffs in error with the value of the property on the 1st January, 1850. If they are chargeable at all, it is only with the actual injury done the defendants. What is that injury? If the injunction had not been obtained, the defendants would have sold the property in November or December, 1848, and could not possibly have realized the enhanced price caused by the rise of

cotton in January, 1850. Even on this view, the utmost Harbinson et al. could be charged with is the difference between the mortgage debt and what the property would have commanded at the time the Harrells proposed to sell. This could not have been more than the value of the hire.

4. The chancellor has certainly decreed against Harbinson et al. two or three times for the same interest. He first holds them liable for the surplus sales, secondly, for the value of the possessory interest, and thirdly, for the difference between the mortgage debt and the value of the property on the 1st January, 1850. The surplus sales are, of course, covered by the difference between the debt and the value of the property on the 1st January, 1850, and for that item they are clearly twice charged. Moreover, the surplus was caused by the sale being made on credit, the property bringing, in the opinion of the witnesses, 20 per cent. more than it would have commanded in cash, and this sum should stand against the hire.

5. The plaintiffs in error having the right to enjoin the sale and separate the mortgage from the possessory interests, it seems clear that they should be allowed their reasonable expenses and attorneys' fees, that expense having been cast upon them by the improper conduct of the defendants in error.

6. Usury is a personal defence, and can only be made by the party promising. He cannot be compelled to plead it.—Fenno v. Sayre & Converse, 3 Ala. 458.

7. The registration in this case was regular; but if slightly variant from the statute, it was sufficient to operate notice.—8 Ala. 356.

8. Whether Gresham shall have his order paid in preference to defendants in error, depends on the question how far the sheriff's levy operated a lien on the surplus. We contend that only the possessory interest, not the equity of redemption, is the subject of levy and sale under the execution at law.—Scott v. Scholey et al., 8 East 467; Wilkes v. Ferris, 5 Johns. 335; Marsh v. Lawrence, 4 Cow. 461.

9. There can be no sound reason given for the sale of an equity of redemption under execution at law. The invariable result is, 1st, a sacrifice of the equity; 2d, great injury, expense and loss to the mortgagee, by putting the property out of his reach. A rule of this kind ought not to be adhered to, even if former courts had so decided.

10. We maintain that our own adjudged cases, which seemingly countenance an opposite principle, can be regarded only as *dicta*.—Perkins & Elliott v. Mayfield, 5 Por. 182.

J. M. Boling, *contra:*

1. Powers, the mortgagor, could not incumber the property after the receipt by the sheriff of the executions in favor of defendants in error and levy upon the mortgaged property, so as to defeat the lien thus created in favor of defendants; hence the order in favor of Gresham does not defeat or postpone defendants.—Burnet v. Dennison, 5 Johns. Ch. 35. Had the mortgagees paid the order, they could not tack it to the mortgage.—Hughes v. Worley, 1 Bibb, 200; Colquhoun v. Atkinson, 6 Mun. 550; 2 Vern. 520; 2 Bridg. Dig. 341, § 135.

2. Defendants were entitled to the value of the possessory interest in the slaves mortgaged, from the time of the levy, provided the mortgaged property was sufficient to pay the mortgage debt. The power given to the mortgagees after that time to sell, and the sale by the mortgagees, cannot defeat the rights of defendants to the value of the possessory interest; neither can it defeat the rights of defendants to have the property valued, 1st of January, 1850. If the mortgagees saw proper to sell before the law day, it was at their own risk.—See Faure v. Winans, 1 Hop. 283; Coote on Mort. 561; Ib. 319; Dibly v. Craggs, Amb. 612. If the mortgagees had retained the slaves until 1850, instead of selling them, they would have been liable for hire.—2 B. Mon. 61; 4 B. & H. Dig. 393, § 11. It follows that defendants are entitled to an account of the possessory interest, from the time of their lien to January, 1850, and the value of the property at that time, (Jan. 1850,) as well as to an account of the surplus, after the mortgage debt shall have been paid.

3. Reasonable cost is all the mortgagees are entitled to out of the property, after paying the debt. They are entitled to nothing for personal services.—Breckenridge v. Brooks, 2 Marsh. 339; Coote on Mort. 353.

4. Although usury is a personal privilege, and although a mere stranger cannot insist upon the invalidity of a usurious mortgage, in respect to which he is neither a party nor a privy, but as defendants in error succeed to the rights of the mortgagor, after the mortgage debt is satisfied they may set up

usury. The mortgage debt should be the money loaned by Reese to Powers, and lawful interest thereon.—Port v. Dart, 8 Paige, 639; 6 Gill. & J. 18; 3 Edw. 195; 4 Barb. & Har. Ch. Dig. 392, § 21.

CHILTON, J.—1. The law is stated in this State that the mortgagor of personal property, remaining in the actual possession before the law day, has such an interest therein as is subject to levy and sale under execution at law. This rule was first asserted in McGregor & Darling v. Hall, 3 S. & P. 397, and has never since been departed from. The difficulty with me has been the *quantum* of the interest thus to be subjected. Is it the mere *usufruct* until the law day, or this, with the mortgagor's equity of redemption? Upon a careful review of the several decisions of this court, I am satisfied that they contemplate the sale of the entire interest of the mortgagor, where his interest is accompanied with the possession. In Marriott & Hardesty et al. v. Givens, 8 Ala. 706, it was said, that "this right of possession for a determinate period is subject to levy and sale, *and carries with it the equity of redemption.*"—See also, Perkins & Elliott v. Mayfield, 5 Por. 182; Williams & Battle v. Jones, 2 Ala. 314.

2. In this case the mortgagor, by the terms of the mortgage, was entitled to retain the actual possession of the property until the first day of January, 1850, and as the levy was made long before that period, it follows that a lien attached in favor of the plaintiffs in execution, which no subsequent act of sale *before* the law day could divest. And this lien, being older than the order given by Powers, the mortgagor, to Gresham, and accepted by the mortgagees, to be paid out of the surplus after satisfying the mortgage debt, must necessarily take precedence over it. The plaintiffs in execution must therefore be preferred to Gresham.

3. We have said the lien of the plaintiffs in execution was not affected by the sale of the mortgaged property, made by agreement between the mortgagor and mortgagees *before* the law day arrived. This being the case, it follows that the plaintiffs in execution are not concluded by that sale. They cannot be placed in a worse condition by the act of third persons, in which they did not participate. They have the right, therefore, to recover the value of the hire of the property levied upon, from the

time of the filing of the original bill until the first day of January, 1850, with interest thereon, and to have an account of the value of the slaves at that time, when by the terms of the mortgage they were, upon the forfeiture of the condition by the mortgagor, to be devoted to the payment of the mortgage debt. This is what the decree of the chancellor, upon a proper construction of it, gives the plaintiffs in execution. The decree, as we understand it, first adjudges the surplus, after satisfying the mortgage, to the plaintiffs in execution, and the hire from the filing of the bill until the law day, and then proceeds to lay down the rule by which the surplus is to be ascertained; namely, by a valuation of the property, as of the first day of January, 1850.

4. The mortgagees claim that they should be allowed reasonable solicitors' fees out of the fund, in addition to their mortgage debt, for filing the bill to separate their interest from that of the mortgagor, which latter was subject to levy and sale. It is sufficient to remark, that such expenses are not provided for by the mortgage deed, and that these fees were incurred by the mortgagees to protect their own interest, not against the unlawful act of the mortgagor, or of any one else, but merely to render their security more certainly available; or it may be, to enable the mortgagees, by an agreement with the mortgagor, to obtain possession of the property and dispose of it before the law day. Such fees are clearly distinguishable from those costs necessarily incurred by the mortgagees in maintaining the title to the estate, &c., which are ordinarily allowed as a charge upon the mortgaged estate.—Coote on Mort. 392.

5. Having arrived at the conclusion that the record presents no error prejudicial to the mortgagees, we turn to consider the errors assigned by the plaintiffs in execution.

The first is, that the mortgage deed was not proved according to the statute, and that consequently its registration under an invalid probate does not amount in law to notice. The objection raised to the probate is, that the witness does not swear that he saw the deed signed and delivered on the day it bears date, but four days subsequent to that on which it appears to be dated. It does not appear that any fraud was intended, or that any injury was done or attempted to be effected by the wrong date. The certificate of probate corresponds substantially with the facts of the case, and although it does not strictly accord with

the *form* given in the statute, yet there is not such a *substantial* departure as will vitiate it.—Hobson v. Kissam & Co. et als., 8 Ala. 357.

6. The only remaining question is, whether the plaintiffs in the executions can take advantage of the usury in the mortgage debt; and were this an open question in this court, we should be strongly inclined to hold, that as to the unlawful per cent., the mortgage would be without consideration, and to consider the actual amount borrowed, with the interest thereon, as constituting the amount to be retained by the mortgagees out of the proceeds of the mortgaged estate. But the rule has, we think, been too firmly established by the previous decisions of this court, to the contrary, now to be departed from. In Cook & Kornegay v. Dyer, 3 Ala. 643, it was held, that "the statutes against usury were intended for the benefit of the borrower; they confer a personal privilege on him which he may waive, and if he does, no one else can take advantage of it." The same doctrine was held in Sayre & Converse v. Fenno, 3 Ala. 458. The decree of the chancellor is in accordance with the law as declared by these adjudged cases.

We are unable to percieve any error in the record, and the decree is consequently affirmed. Let each party pay half the cost in this court.

SHEPPARD *vs.* FURNISS.

1. A count *in case* for a malicious prosecution must aver the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof.
2. Case is the proper remedy for the malicious use of process regularly issued from a court of competent jurisdiction; but when the proceeding complained of is merely irregular, trespass is the remedy.
3. The form of action adopted by the pleader does not always determine the character of the count; but it may be adjudged a count in trespass, or a count in case, according to the facts stated in it, and the conclusions which the law draws from those facts.
4. A count which avers that the defendant falsely and maliciously

made an affidavit in writing, &c., and upon said affidavit falsely and maliciously caused and procured said plaintiff to be arrested by his body, and to be imprisoned, and to be kept and detained in prison for a long time, to wit, for the space of ten days then next following, at the expiration of which said time the said plaintiff, in order to procure his release and discharge from said imprisonment, was forced and obliged to, and did, then and there, pay to said defendant a large sum of money. to wit, &c., and was thereupon discharged and released from said arrest and imprisonment, &c., is a good count in trespass.

5. A count in trespass cannot be united in a declaration with a count in case.

ERROR to the Circuit Court of Montgomery. Tried before the Hon. Robert Dougherty.

THIS was an action of trespass on the case "brought to recover damages of defendant for maliciously and unlawfully causing plaintiff to be arrested under a *cap. ad sat.* sued out at the instance of defendant on a judgment rendered in defendant's favor against Allen M. Sheppard and Robert A. Sheppard, in the Circuit Court of Montgomery County, at the May Term, 1847, and detaining his body in prison for a long space of time, to wit, for ten days."

The declaration contained five counts, the first and second of which are sufficiently described in the opinion. The defendant demurred to the whole declaration for a misjoinder of counts, and to each count separately, and his demurrer was sustained.

ELMORE & YANCEY, for plaintiff in error:

1. The first count is certainly good, and the judgment therefore ought to be reversed, although all the other counts may be defective, because the writ under which the arrest was made is not set out in them.

2. The second count is a good count in case. 1. Because the recital of injury is under a "whereas.—1 Chitty's Pl. 387. 2. Because a motive is alleged, as "maliciously," &c.—Ib. 388, note p. 3. Because the arrest and imprisonment are averred to have been caused and procured "upon said charge and affidavit." It is also averred that upon payment being made, plaintiff was "thereupon discharged." 4. Because the statement of damages is consequential, as injury "to credit and reputation,"—

"suffered great anxiety and pain of body and mind,"—"greatly hindered and prevented, by reason of the premises, from following and transacting his business," &c.

Where, in an action on the case for malicious use of process, it is not averred that the acts complained of were done under and by virtue of legal process, yet if it appear that a charge was legally preferred, and it is averred that "upon such charge" the defendant did the acts complained of, it will be presumed that the acts were all done in pursuance of process issued upon such charge.—Hensworth v. Fawkes, 4 Barn. & Adol. 449; (24 E. C. L. R. 102;) Howard v. Banks, 2 Bur. 1113.

In these counts the averments of arrest and imprisonment may properly be made, as in aggravation; and this action may be considered as case for the maliciously making such an affidavit, and thus commencing a malicious prosecution.—4 Barn. & Adol. 449. In determining whether this is a count in case or trespass, the court will look to the whole count, and not to a particular part.—Ib.

3. The second count is not in trespass, 1. Because in trespass injury is stated without any inducement of defendant's motives.—1 Chitty's Pl. 387. 2. Because, in trespass the injury is stated directly, and not by way of recital.—Ib. 3. Because, in statements of trespasses the words "*vi et armis*" are used.—Ib. 4. Because, in trespass the conclusion is "*contra pacem*," &c.

The second count then being but a defective count in case, and not a count in trespass, the demurrer for misjoinder of counts should have been overruled; and the first count being good, the demurrer to it and to the whole declaration was improperly sustained.

Belser & Harris, *contra*:

The first count, if it shows any cause of action at all, is a count in case. The second, if not fatally defective, is certainly a count in trespass, because it shows a forcible injury to the plaintiff occasioned immediately by the act of the defendant.—1 Chitty's Pl. 124-25-26-27, 133, 168.

It is not the title of the form of action which the pleader adopts that determines the nature of the count. The count must be adjudged trespass or case according to the facts stated in it,

and the conclusions which the law draws from those facts. Trespass is the only remedy for a menace to the plaintiff attended with consequential damages, and for an illegal assault, battery and wounding, or imprisonment, when not under color of process.—1 Chitty's Pl. 167. Also, whenever an injury to a person is occasioned by a regular process of a court of competent jurisdiction, case is the proper remedy, and trespass is not maintainable, as for a malicious arrest.—Ib. 133.

In addition to these English authorities, this court has decided two cases which must be conclusive to show that this second count is a count in trespass, and not in case. In Duckworth v. Johnston, (7 Ala. 581,) it is held, that when an injury is done to a person by the regular process of a competent court, although it may have been the result of malice, case is the proper remedy, and trespass is not sustainable; and it is there said, that the warrant being a nullity, "it follows necessarily that it should not have been executed, and the authorities cited conclusively show that not only the officer, but the party who caused it to be issued, is liable in trespass to the plaintiff." In Ragsdale v. Bowles, (16 Ala. 62,) this court expressly decided that a count substantially the same as the second count in this declaration was a count in trespass, and not in case.

No case can be found where case has been held to lie for the arrest and imprisonment of a party, when not under color of process; and the affidavit set out in the second count certainly was not an authority to any person to arrest the plaintiff.

COLEMAN, J.—The declaration in this case contains five counts, and the defendant has demurred to the whole declaration for a misjoinder of counts, and to each count separately.

The first count in the declaration is a count in trespass on the case.

The second count avers that the defendant falsely and maliciously, &c., made an affidavit in writing before the clerk of the Circuit Court of Montgomery County, stating in substance that said Furniss had recovered a judgment in said court against said Robert A. Sheppard, and one Allen M. Sheppard, for the sum of seventy-five dollars damages, besides costs, and that the said Robert A. is about to abscond, and that the said Allen M. Sheppard has absconded, and that bail is not required for the pur-

pose of vexing or harrassing said Robert A., &c. The count avers that upon said affidavit and charge, said defendant then and there, to wit, on the 8th of January, 1849, falsely and maliciously caused and procured said plaintiff to be arrested by his body, and to be imprisoned, and to be kept and detained in prison, &c. There is no averment in the count that any process was issued by virtue of the affidavit, or that the plaintiff was arrested on or by virtue of any process. It is very clear, that to constitute this a good count in case, it should have averred the issuance of process, that the process should have been properly described, and that it should have further averred that the plaintiff was arrested and imprisoned by virtue thereof.—2 Chitty's Pl. 601; 1 H. Bla. 49; 1 T. R. 238.

It cannot be contended that the affidavit set forth in this count, although it authorized the issuance of process, authorized any one to arrest the plaintiff. Whenever an injury to a person is effected by a regular process from a court of competent jurisdiction, though *maliciously* adopted, case is the proper remedy, If, on the other hand, the proceeding complained of was merely *irregular*, as set forth in this count, the remedy is trespass.—1 Chitty 136. But the question arises whether this is a good count in trespass. It is not altogether the form of action adopted by the pleader, which determines the character of the count; it may be adjudged trespass or case according to the facts stated in it, and the conclusions which the law draws from those facts. In the case of Ragsdale v. Bowls, (16 Ala. 62,) it was held that a count which avers that the defendant falsely, maliciously, and without probable cause, charged the said plaintiff with the crime of felony, and upon said charge falsely and without probable cause, caused the said plaintiff to be arrested by his body, and to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of one day then next following, at the expiration of which time, he, the said defendant, caused the plaintiff to be released, and wholly abandoned his prosecution, is a good count in trespass for false imprisonment. The decision rests on the ground that the averment, that the defendant caused and procured the plaintiff to be arrested by his body and imprisoned, is plainly the averment of a forcible injury, and rejecting as surplusage that part of the count stated as inducement, it becomes a good count in trespass,

We consider the decision in the case referred to decisive of this case, for the material averments in the counts in both cases are substantially the same. It follows that the first count in the declaration being in case, and the second in trespass, there is a misjoinder of counts, and the demurrer was properly sustained.

The judgment is affirmed.

JUDGE *vs.* WILKINS.

1. Mere inadequacy of consideration, within itself, and disconnected from all other facts, is not a sufficient ground for setting aside a contract, or granting relief against it in equity.

ERROR to the Chancery Court of Mobile. Tried before the Hon. J. W. Lesesne.

JOHN A. ELMORE, and COOK, for plaintiff in error:

I. Can the court afford relief or take jurisdiction of the cause? A court of chancery has an undoubted jurisdiction to relieve against every species of fraud, whether,

1. *Malus dolus* and actual, arising from facts and circumstances of imposition;

2. Or apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under a delusion, would make on the one hand, and no honest and fair man would accept on the other;

3. Or such as may be presumed from the circumstances and condition of the parties, when there is a surreptitious advantage taken of the weakness or necessity of another. When therefore an advantage, such as no honest and fair man would take, is taken of the ignorance, mistake, weakness or necessity of another, no matter from what cause these may be produced, it constitutes a fraud in equity.—2 Ves. sr. 155; Kennedy v. Kennedy, 2 Ala. 593; 1 Story's Eq. Ju., §§ 188, 197, 222, 251, 119.

II. Inadequacy of price so gross as to shock the conscience, is

sufficient evidence of fraud. And if the inadequacy is not of such a character, yet when coupled with other circumstances, it is considered evidence of unfair practices.—1 Story's Eq., §§ 188, 244, 245, 246, 248, 251; 9 Ala. 686; 12 ib. 70.

III. Of this character are the cases where the party has been relieved on the ground of surprise and want of deliberation.—1 Story's Eq., §§ 119, 147, 187, 188, 222, 251, (220 Note;) 1 Coxe, 339; 16 Ves. 82.

IV. An agent can derive no benefit from a contract made with his principal, based on superior knowledge of the property, acquired in that capacity. The relation is one of trust and confidence.—1 Story's Eq., §§ 197-8, 207, 218, 307-8-10, and Note 2, §§ 315-16, A, 317; 9 Ala. 662-84; 5 ib. 94; 4 Por. 293; Newland on Con. 451; 9 Por. 675. The above principles all apply to this case separately and conjointly, and the courts of equity grant relief on mixed considerations, when not altogether satisfied with any single one.

V. Is the complainant concluded by the trial at law?

1. The question of fraud was not submitted to or passed on by the jury; and if that court had jurisdiction of this fraud, it was never exercised.—6 Ala. 34.

2. The court of law could only inquire into the fraud attending the execution of the deed for the slaves, not that which procured its execution. The issue would be, did Judge at the time intend to execute that instrument, not how he was induced to that intention; the same issue that would arise on plea of *non est factum*.—9 Port. 63; 1 Ala. 100; 2 ib. 592; 3 Phillips' Ev. (C. & H.) Note 969, p. 1449; 3 Chitty on Pl. (Note 1,) 964; 6 Munf. 364; Clay's Dig. 340, §§ 152-3; 13 John. 430; 5 Cow. 506; 2 Rand. 426; 14 S. & R. 208.

3. The court of law could only treat the deed as void for actual fraud. It could not set it aside, or order it to be cancelled, and rescind the contract. It could not declare the deed void for inadequacy of price, or for surprise, or notice, the confidential relations of the parties, the mistake, or ignorance, or accident; these are cases of constructive fraud, cognizable only in equity. 1 Stroy's Eq., §§ 60, 190, 307, 437; White's Lead. Ca. 418, and authorities cited; Law Lib. No. 65; Story's Eq. Pl., § 473.

4. If the contract on which the Wilkins' were suing had been executory, then perhaps the court of law, on proof of the fraud,

might have refused its aid; but this was an executed contract; the title to the negroes had passed, and in that action the court could only inquire where is the title. In taking jurisdiction in such a case, the court of chancery does not say no title passed, but says it passed under such circumstances, that no honest man would keep it, and declares the purchaser a trustee for the seller.—18 Pick. 104.

5. The want or failure of consideration could not have been made a defence; because there was the bond for titles, the possession of the property, and the excess of value of the house and lot over the liens.

VI. When the defence could not be made at law, the attempt to do so will not affect the plaintiff's rights.—3 Ala. 406.

VII. There was an offer to rescind in time, August, 1841. If not proved, it is immaterial, as Wilkins in his answer says it would not have been accepted. T. J. Judge proves it was made in August, 1841.—Elliott v. Boaz, 9 Ala. 772.

IX. The complainant is not concluded by the cases of Dunklin v. Wilkins, 5 Ala. 199; Wilkins v. Judge et al., 14 ib. 135.

1. Because the fact of the instrument being a deed does not appear in either of the cases.

2. The first is a case at law, where the defence could not be made.

3. In the last case, the court dismissed the bill without prejudice to Judge.

4. The point of its being a deed was not made or decided by the court in either case.

X. The case of Clemens v. Loggins, 1 Ala. 652, does not militate against our views. That was an executory contract, a suit on the note, and an entire failure of consideration, and the court was called on to enforce it.

Thos. H. Watts, *contra:*

1. The judgment at law is conclusive of all matters of fraud which were relied on as a defence, or which, under the issue joined, might have been relied on in the action at law, between parties and privies.—See Hopkins v. Lee, 6 Wheat. 109; 11 Mass. 445; Boynton v. Willard, 10 Pick. 166; 1 Baily, 533; 4 Rawle, 273; 10 Pick. 391; Davidson v. Shipman, 6 Ala. 27; Cummings v. McGehee, 9 Por. 349, and authorities there cited.

As to the fraud in obtaining the title to the slaves, apart from the alleged fraud in selling the house and lot, the judgment at law is conclusive; and if there should be such independent equitable ground for relief as would authorize chancery to interfere, the court of chancery must look alone to the independent equitable ground. To permit the Chancery Court to look beyond this, would permit every defendant at law to practice a fraud on the court, and unhinge its best settled rules in regard to enjoining or giving relief against judgments at law.—13 Ala. 198, and authorities there cited.

2. The fraud charged in the sale of the slaves, considered apart from the sale of the real estate, certainly was or could have been relied on as a defence at law.—See 5 Ala. 199; 13 Wend. 570; 14 Ala. 139; 3 Johns. 235; 8 Cow. 240, and Note; 18 Pick. 102; 7 Mass. 117; 2 Watts, 66; 13 Ala. 44; 5 ib. 277.

3. There is no reason why the alleged fraud in the sale of the house and lot might not have been set up in the court of law. There was no deed; the contract was executory merely. It does not appear from the bill, answer or proofs that Judge was ever in possession.—See 1 Ala. 622. The court at law could have done as complete justice as the court of equity. In neither court can the parties be placed *in statu quo*.

4. The fact that the fraud was not actually decided by the court of law, can give no equitable jurisdiction. The decision of the court of law was wrong, and Judge had his remedy in an appellate court. His failure to have the law case revised was his fault and neglect, and he cannot complain in equity.—Barrow v. Governor, 13 Ala. 540, and authorities there cited; 9 Ala. 120, and authorities there cited; 7 Ala. 666; 2 Port. 262; 3 Stew. 155; 2 Por. 177; 15 Ala. 503. The Chancery Court never grants relief in the nature of a new trial.—See McGrew v. Tombigbee Bank, 5 Por. 547, and authorities there cited; 8 ib. 432.

5. Every ground of fraud alleged in the bill is fully denied in the answer, and the proof utterly fails to support the bill; but on the contrary, substantially supports the answer in every essential particular. Fraud will never be presumed, but must be clearly proved.—See Story's Eq. J.; 3 J. J. Mar. 540; 8 Pet. 244; 12 ib. 178.

6. An agent may well purchase after the agency ceases.—See

McKinly v. Irvine, 13 Ala. 682. Here the agency was of short duration, and produced no such confidence and trust as would come within the rule for relief, and the proof shows clearly that no advantage was taken of Judge by means of the agency.

7. Mere inadequacy of price has never been held to authorize a rescision of a contract.—See Juzan v. Toulmin, 9 Ala. 662; 1 Story's Eq. (4th edit.) § 245 to 250, inclusive, and authorities there cited; Osgood v. Franklin, 2 Johns. Ch., and authorities there cited. There is no allegation that Judge relied on Wilkins as to the value either of the house and lot or slaves. There is no allegation that he had no opportunity of finding out the value, by the use of due diligence. A representation as to value is a matter of judgment; and if it were false, would be no ground of relief.—See 1 Story Eq. Ju., § 197, (4th edit.;) 1 Wheat. 189; Kent's Com., 2 vol. 484-5, (4 edit.;) see also, Griffith v. Spratly, 2 Bro. Ch. 179; in the Note; 5 Ves. 345. Even the civil law, as regards personal property, would not give relief.—See 1 Story's Eq., § 247. The rule that if the price given be less than half the value, applies solely to real estate; and this is wholly an artificial rule.—See 1 Story's Eq., § 247; see also, 2 S. & P. 9; 1 Por. 328; 3 Stew. 243.

8. A court of equity will never rescind a contract when the parties cannot be placed *in statu quo*.—1 Story's Eq., (4 edit.) § 250; Burnett v. Stanton, 2 Ala. 181; Turner v. Clay, 3 Bibb, 53, (cited in B. & H.'s Ch. Dig.) And especially is this the case, when the reason why the parties cannot be placed *in statu quo*, has been brought about by the fault or neglect of the party seeking relief.—See Turner v. Clay, 3 Bibb, *supra;* 1 Story's Eq. J., § 250. In this case, it is by Judge's failure to comply with his contract in paying the liens he undertook to pay, whereby the house and lot were sold, that the parties cannot be placed *in statu quo*.

9. A party who seeks equity must show that he is without fault or neglect on his part. He must come into court "with clean hands," or he cannot get relief, however much wrong he may have sustained.—See Sanders v. Fisher & Phelps, 11 Ala. 812. In this case the complainant seeks to revise a judgment at law. This cannot be done, if there appear any fault or neglect on his part.—See French v. Garner, 7 Por., and authorities cited under fifth point.

DARGAN, C. J.—William Judge, who resided in Butler County, Alabama, left the State when about eighteen years of age, and went to Mississippi. After remaining there for a time he left Mississippi and went to Texas, where he remained until the summer of 1841. At the time he left Alabama he owned a negro woman and her three children, which were in the possession of his guardian, and during his absence she had two other children. His guardian also left Alabama, and abandoned the charge and control of the slaves, but Joseph Dunklin, the brother-in-law of Judge, took possession of them as his agent and for his benefit. In March, 1841, shortly after Judge became of age, he gave to Lavender S. Wilkins, who resided in Austin, Texas, a power of attorney, authorizing him to take possession of the slaves then in Alabama, and bring them to Texas. Wilkins came to Alabama, and demanded the slaves as the agent of Judge, but Dunklin declined sending them by him. Wilkins returned to Texas without the slaves, and shortly after his return Judge agreed to buy of him and his brother, John H. Wilkins, a house and lot in the town of Austin, and agreed to give them twenty-seven hundred and fifty dollars, and in part payment he agreed to give his negroes, then in the State of Alabama, which were valued in the trade at sixteen hundred and fifty dollars; for the residue of the purchase money he agreed to pay certain debts owing by Lavender S. and John H. Wilkins, and which constituted a lien on the land. Judge executed a bill of sale for the slaves, and Lavender S. and John H. Wilkins gave him a bond to make titles to the lot upon his paying those debts and discharging the liens. A short time after this trade, both Lavender S. and John H. Wilkins left Texas, and the former came to Alabama and demanded the slaves as his property; but Judge having returned from Texas, and alleging that he had been defrauded in the trade, Dunklin refused to deliver two of the slaves which he had in his possession; whereupon an action of detinue was commenced against Dunklin in the name of Lavender S. and John H. Wilkins, and a judgment recovered against him for the slaves, or their alternate value. William Judge then filed this bill, to enjoin the delivery of the slaves by Dunklin, in discharge of the judgment, and on the ground of fraud prayed a rescision of the contract. The chancellor, being of the opinion that the evidence did not establish the fraud, dis-

missed the bill, and from this decree a writ of error has been prosecuted to this court.

As the answers fully and completely deny the allegations of fraud, we must look to the proof to see if it is established, or if any fact is proved from which the court can infer fraud.

I think that the value of the house and lot that Judge bought may be fairly fixed at fifteen hundred dollars. One of the witnesses values it at eight hundred dollars; two at twelve hundred and fifty; one at fifteen hundred, and two at two thousand dollars; they, too, were all examined on the part of the complainant. I think also, that the fair value of the slaves, situated as they were in Alabama, was about twenty-one, or two, hundred dollars. According to this valuation, Judge agreed to give twenty-seven hundred and fifty dollars for property worth fifteen hundred, but in the mode of payment adopted by the parties, and which was part of the contract, it cost him about thirty-two, or three, hundred dollars. Is this inadequacy of consideration sufficient *within itself* to justify the court in coming to the conclusion that there was fraud in the contract? I follow the language of the authorities in saying, that inadequacy of price, or other inequality in the bargain, is not *within itself* a sufficient ground to avoid a contract in a court of equity, on the ground of fraud; for courts of equity, as well as courts of law, must act upon the ground that every person, who is not under some legal disability, may dispose of his property in such manner and upon such terms as he sees fit; and whether his bargains are discreet or not, profitable or unprofitable, are considerations not for courts of justice, but for the party himself.—1 Story's Eq. § 244; Low v. Barchard, 8 Ves. 133; Griffith v. Spratley, 1 Coxe's Ch. 383; Collier v. Brown, ib. 429; Osgood v. Franklin, 2 Johns. Ch. 1-23, and cases there cited. It is, however, said, in many cases, that there may be such gross inadequacy of price as to demonstrate imposition, or undue influence, and in such cases a court of equity ought to interfere; but then the inadequacy should be so gross as to *shock the conscience of the chancellor*, and amount itself to evidence of fraud.—See 1 Story's Eq. § 246, and cases by him cited. But I think it might be asked, what inadequacy of price would shock the conscience, or be conclusive evidence of fraud? Suppose it appeared that one had, in consideration of one hundred dollars, or even a less sum, con-

veyed to another a house worth ten thousand dollars, and this was all the proof, would the conscience of the chancellor be shocked? Could he say upon these facts, *without more*, that there was fraud? The party himself may not have thought there was; he may have been influenced by reasons satisfactory to himself, and not by the consideration in money, in making the deed. No court, I apprehend, professing to be governed by the common law, could, in the case supposed, set aside the contract, or declare it fraudulent upon the grantor. This supposed case, to my mind, clearly illustrates and proves the rule acknowledged by all English courts, that inadequacy of price *within itself*, and disconnected from all other facts, cannot be a ground for setting aside a contract, or affording relief against it. There must be something else besides the mere inadequacy of consideration or inequality in the bargain, to justify a court in granting relief by setting aside the contract. *What this something else besides the inadequacy* should be, perhaps no court ought to say, lest the wary and cunning, by employing other means than those named, should escape with their fraudulent gains. I, however, will venture to say, that it ought, in connection with the inadequacy of consideration, to superinduce the belief that there had been either a suppression of the truth, the suggestion of falsehood, abuse of confidence, a violation of duty arising out of some fiduciary relation between the parties, the exercise of undue influence, or the taking of an unjust and inequitable advantage of one whose peculiar situation at the time would be calculated to render him an easy prey to the cunning and the artful. But if no one of these appears, or if no fact is proved that will lead the mind to the conclusion, that the party against whom relief is sought has suppressed some fact that he ought to have disclosed, or that he has suggested some falsehood, or abused in some manner the confidence reposed in him, or that some fiduciary relation existed between the parties, or that the party complaining was under his influence, or at the time of the trade was in a condition, *from any cause*, that would render him an easy victim to the unconscientious, then relief cannot be afforded; for inadequacy of consideration, *standing alone and unsupported by any thing else, can authorize no court, governed by the rules of the English law, to set aside a contract*. A different rule, it is said, obtains in the civil law in regard to immoveable property;

but we cannot be governed by the civil code when it is opposed to our own; nor is it even necessary to enter into an investigation to see which system of laws, in reference to this question, is preferable. Our own system must be our guide, and we can follow no other rules. Looking then to the testimony, can we discover any other trace of fraud than mere inadequacy of price? If we cannot, the decree must be affirmed.

It was said, in the argument at the bar, that Wilkins acquired his knowledge of the value of the slaves during his agency; that Judge was not apprised of their value, and thus, through the relation of principal and agent, he was enabled to take an undue advantage over Judge, the principal. But the agency had ceased before the trade, and there is no evidence that tends to show that Judge was not in the possession of all the facts, in relation to his slaves, necessary to enable him to form an accurate opinion as to their value. He knew the negro woman and her three children before he left Alabama, and was informed that she had given birth to two others during his absence; for the bill of sale shows that he undertook to convey six negroes, giving the names of four, to-wit, the negro woman and her three children which she had before he left, and two other children, whose names were not known or recollected. Judge was in Austin and saw the house, and could have formed an accurate opinion of its value; at least he was in possession of every fact necessary to form a proper judgment of its worth. And although the bill alleges that Wilkins made false representations in relation to the condition of the slaves, and that Dunklin was unwilling to surrender them to the complainant, in consequence of which their recovery would be attended with trouble and expense, yet these allegations are fully and completely denied by the answers, and there is no proof to sustain them. Indeed, independent of the inadequacy of the consideration, or the inequality of the trade, there is no fact proved, in opposition to the answer, that can justify any court in saying that fraud is proved. It is true the house and lot have been sold under the liens that existed upon it, and thus its entire value has been lost to Judge; but he stipulated to pay and discharge those liens, and his default cannot become the ground of fraud against the opposite party. I have also duly weighed the testimony of Thomas Judge, as to what took place at Hayneville, after the parties met in Alabama. It cannot,

according to the rules of evidence, form any ground to impeach the contract. The answers assert that the account, or the supposed debt due from Beattie to the Wilkinses, did not form any part of the trade, but that this debt was left with Judge as the mere agent of Lavender S. and John H. Wilkins. The written evidence afforded by the contract, rather corroborates than discredits the answer; and the deposition of Judge cannot outweigh the answer, corroborated as it is by the written contract, even if the facts to which he deposes could be considered, in any point of view, as forming a just ground from which fraud could be inferred.

After a careful examination of all the proof, I am unable to lay my hand upon any one fact and say, that this fact, in connection with the inadequacy of price, according to the rules we have laid down, is sufficient to justify the court in setting aside the contract. It is true that it would not have been an unpleasant duty to afford the relief sought by the bill, if the proof had warranted us in so doing; for it is manifest that the complainant has suffered serious injury from the contract. But he is legally capable of contracting for himself; there is no want of mental capacity, and he must bear the consequences of his own unwise or imprudent acts.

Let the decree be affirmed.

MOORE *vs.* SMITH.

1. It is not error to permit the plaintiff to amend the endorsement on his writ, so that he may add special counts to his declaration.
2. A contract by which the plaintiff agreed to serve the defendant as an overseer for one year, to furnish a certain number of hands and horses which were to be worked on defendant's plantation with his hands and horses, to defray the expenses of himself, his hands and horses, and to receive one fourth part of the crop raised as his compensation, does not make the parties partners *inter sese.*
3. A count in assumpsit set forth, "That in consideration that the said plaintiff would furnish three hands, and feed and clothe said servants for the year 1844, and pay all of their expenses, and work the same

on the plantation of said defendant in Perry County, Ala., and furnish provisions for himself and his family and said three hands, the lands and mules and horses of said defendant in the capacity of an overseer, he the said defendant agreed and promised to place on said plantation his hands, to wit, the hands owned by him, and live on said farm and his mules and horses and to furnish the said hands, &c., placed by him on said plantation with provisions and said hands with clothing, to pay all expenses of the said hands and mules, and to let said plaintiff cultivate said farm until said hands and mules so furnished as aforesaid by said plaintiff and said defendant, and raise a crop thereon in said year 1844, for which said defendant agreed and promised that said defendant should have and draw a part of the crop raised on said farm by said defendant with the said hands, mules and horses in the year 1844, in proportion to the said hands of plaintiff so placed on said farm," &c, and averred that the plaintiff performed the contract on his part, in all things, and raised a crop on said plantation, "of which his reasonable share was one third thereof," &c. *It was held*,

That the count was demurrable, the contract as set out being too vague, indefinite and uncertain to support an action.

ERROR to the County Court of Perry.

JOHN for plaintiff in error:

1. The court should not have allowed the plaintiff below to amend the endorsement of the cause of action, because more than two years had elapsed since the commencement of the suit; there had been a trial and a new trial; the amendment introduced a new and different cause of action, and by that cause the defendant was deprived of the statute of limitations.—1 Tidd's Pr. 698, 708.

2. New special counts should not have been allowed as in this case. The plaintiff had speculated on the common counts, and should not be permitted, after so long a lapse of time, to change entirely the character of his case.

3. The special counts, each of them, show a complete and perfect partnership, and therefore the demurrers were each of them good, and should have been sustained. But the proof in the case is likewise full and perfect to establish the partnership, and raises the same question as to what constitutes a partnership.—Collyer on Part., § 3; Story on Part., § 2; 3 Kent's Com. 24.

4. By examining the several points in this definition with reference to the counts and proof, it will be found that the contract meets every point in the definition. 1. The contract must be voluntary.—Collyer on Part. 5, § 8. There is and can be no question on this point. 2. There can be as little difficulty as to the number and competency of the parties. 3. The proof is very clear that the parties joined together their goods, labor and skill. Each furnished hands and team; Moore land, and Smith labor and skill.—Collyer on Part. 12, § 16. 4. The communion of profit is very clear.—Coll. on Part. 13, § 18-19, and further in illustration of this point, see 16 John. 34-40; 3 N. H. R. 64; 6 Conn. 347; 18 Wend. 174; 3 Dev. 89; Collyer on Part. § 24. The interest in the profit was mutual, and was not a compensation to Smith for his services as overseer or agent, because Moore's land was by the contract put in against Smith's services.—Collyer on Part. § 25. But the contract as set out in the declaration, without this part of the proof, shows a copartnership.—Ib. § 38. 5. This was clearly a lawful business. There is, therefore, not a solitary ingredient wanting in this case to make a perfect partnership between the parties.

5. It may be contended that because there was no express stipulation that Smith was to be responsible for losses, that the contract does not constitute them partners. If this position were sustained by the facts, the conclusion would not follow, because "a communion of profit implies a communion of loss," for "every man who has a share of the profits of a trade ought also to bear his share of the loss. It is not, however, necessary that every party to the contract should undertake to share the loss."—Coll. on Part., § 18.

6. But the declaration and proof both show that the loss was expressly provided for, because each was to bear his own expenses, and this was the only probable loss that could occur in the business for which this partnership was formed, except the destruction of the crop after made, and this would be a mutual loss.

7. If the agreement in the case as set out in the declaration shows a partnership existing between the plaintiff and defendant, the two special counts are bad, and the demurrers to them should have been sustained. Or if the proof showed a copartnership, then the first charge, as requested by the defendant, should have

been given, and the charge given by request of plaintiff below should not have been given.

8. If it was proven that Smith was to put in his services against Moore's land, or that he agreed to take compensation for his services in land to be furnished by Moore, then he certainly should not be compensated twice for the same service. But admit that he should recover twice, he could not do so in this case. He could not recover under the common counts, because the proof showed a special agreement, and by that agreement payment was to be made in a specific thing, (land) and not in money.—10 Ala. 330.

9. There could be no recovery under the common counts in this case.—4 Por. 502; 10 Ala. 330.

10. The cases of Gazzam v. Kirby, (8 Por. 253,) Hunter v. Waldron, (7 Ala. 754,) Dukes v. Lowrie, (13 Ala. 457,) are a different class of cases, and involve a different and distinct principle.

11. The second special count is bad for want of certainty, and for that reason also the demurrer should have been sustained to it.

GARROTT, *contra*:

1. The allegations in the two special counts of the facts set out in the bill of exceptions, do not show a partnership between the plaintiff and defendant. The contract is a common one through the country. It is the ordinary case of the employment of an overseer by a farmer, who, instead of paying him in money for his services, agrees to pay him a part of the crop he may raise. The fact that Smith agreed to work his own hands and team on the farm does not affect the principle, he being compensated therefor in the same that he was for his services. The part of the crop he was to get was understood and intended as compensation for his services and the services of his hands and horses, and not as a sharing in the profits and losses of the alleged partnership.

There is not the first constituent element of a partnership in the contract between these parties as between themselves, for there was no community of the stock put in. Moore had no right whatever to what Smith put in, nor Smith had any right to what Moore put in. The right of each to his own property

previous to the contract remained unimpaired; in fact it was distinctly and carefully preserved by the terms of the contract entered into. If a negro or horse died during the year, or a house on the farm should be destroyed by fire, it was the individual loss of him who owned it previous to making this contract. —3 Kent 23.

There was no community of loss between the parties. According to the contract, Moore clothed and fed his negroes and furnished food for his team, and Smith did the same and supported his family; in other words, each paid his own expenses. Coll. on Part. § 18.

There was no communion of profits between them. The contract was not to divide the profits; it was to divide the crop itself, not the nett proceeds thereof after deducting expenses. If either party was at an expense or loss by clothing, doctors' bills, or death of one of his negroes, he had to bear it himself, and could not deduct any thing therefor out of the profits of the crop. If it cost any more to feed his negroes and horses than it did the other, it was the same; his profits alone were diminished, while the share of the other remained untouched.—Coll. on Part., 13 § 18; 12 Conn. 69.

If either party should make any advances to defray the expenses incurred, he could have no lien upon the effects of the alleged firm, because, by the terms of the contract, the stock of each remained as before, and each was to defray his own expenses.

There is no community of interest between plaintiff and defendant in the profits, as profits.—Coll. on Part. 30, § 40; ib. 36, note 2; 12 Conn. 67.

The parties were to receive, not a certain portion of the nett profits, but a portion of the gross earnings.—Coll. 26, § 35, note 2; 6 Pick. 335; 1 Camp. 329.

In this case neither party would be entitled to an "account" against the other, and therefore there is no partnership.—6 Ala. 215; Coll. on Part. 35, note 2.

This is not a partnership, because plaintiff and defendant are not jointly concerned in the sale of the property to be acquired. Each one takes his share of the crop, and sells or not, or uses as he pleases, and the other can say naught against it. This is inconsistent with the idea of a partnership.—3 Kent. 25-6.; 6 Greenl. R. 76.

2. It is contended that it is the ordinary case of a principal and agent, the agent having to be paid out of what is paid by the use of the capital furnished, and his own exertions. On this point the following authorities are relied on: 6 Greenl. R. 76; 3 Mason 138, (141-2;) 6 Halsted 181, (184;) 4 Esp. 182; 1 Camp. 331; 10 John. R. 235; 3 Ala. 733; 6 ib. 215, (217;) 10 ib. 330.

It is the intention of the parties that makes them partners *inter sese*.—Story on Contracts, § 203.

3. Under the statutes of this State the courts have full discretion in granting amendments of the process before them. These statutes have been so repeatedly construed, that it is deemed unnecessary to do more than refer to them to show that this court will not revise an exercise of this discretion.—Clay's Dig. 321, § 50.

CHILTON, J.—This was an action of assumpsit brought by Smith, the defendant in error, against Moore, to recover five hundred dollars, (as the cause of action was originally endorsed on the writ,) upon the common *indebitatus* counts. By leave of the court the endorsement of the cause of action was amended, so as to enable the plaintiff to declare in special counts for one thousand dollars, being the value of one fourth part of the crop raised by the plaintiff on the land of the defendant in the year 1844. The permission to amend is assigned as one of the errors; but we think it was clearly within the discretion of the court to allow it. The object of the amendment was merely to enable the plaintiff to declare specially upon the same cause of action, and we think the statute (Clay's Dig. 321, § 50,) as well as several decisions of this court, fully sustains the action of the court in allowing special counts to be added.—*Ex parte* Ryan, 9 Ala. 90; Teneson v. Martin, 13 Ala. 21.

2. The declaration contains the common counts, and two special counts, to each of which there was a demurrer.

It is contended by the plaintiff in error that both these counts are bad, because, as he alleges, they show a partnership existing between the parties in reference to the subject matter of the demand sought to be recovered. And it is also insisted that the second count is insufficient, in that it fails to set forth the liability of the defendant with sufficient certainty.

With respect to the first objection, we do not think it tenable. The substance of the contract declared upon is, that in consideration of the services of the plaintiff as overseer for the year 1844, and of his furnishing three hands and one horse and incurring all the expense incident to his and their support, the defendant, (as stated in the first special count,) would furnish six hands and three mules and horses, and subsist them; all to work upon the plantation owned by the defendant, in Perry County, for the year 1844; and the said defendant would allow and give to the said plaintiff one fourth part of the crop to be raised upon said plantation.

We think it very clear that by this agreement, the parties *inter sese* did not contemplate the creation of a partnership; but that it is another mode only of providing compensation to the plaintiff, for his own and the service of his hands and horse, by giving him a portion of the crop instead of a moneyed compensation.

To constitute a partnership between the parties themselves there must be a communion of profits between them, and to constitute this, the interest in the profits must be *mutual.* Each party must have a specific interest in the profits as a principal trader.—Collyer on Part. 21, § 25. "He is not a partner if he merely receive out of the profits a compensation for his trouble, in the character of an agent or servant of the concern."—Story on Part. § 49, 55; Coll. on Part. § 25; 1 Denio 337; 6 Met. 82. Judge Story, in commenting upon the test of partnership as evidenced by the agreement to participate in the profits *as profits*, or as a principal trader, says, the true meaning seems to be, "that the party is to participate, indirectly at least, in the losses as well as in the profits, or in other words, that he is to share in the nett profits and not in the gross profits." "If," says he, "the party is to share in the nett profits, which supposes him to have a participation of profit and loss, that will constitute him a partner; if in the *gross profits*, then it will be otherwise."

In the case before us, the defendant in error was to receive one fourth of the gross profit, and was not liable for the loss. Had the six hands and the mules and horses furnished by Moore all have died pending the year, the loss would have been his own, and so with respect to Smith. There was no mutuality in the

loss, but they were severally bound each to bear the loss and expense incident to the property used in the cultivation of the farm. It is but the common case of giving the overseer a portion of the crop raised as his compensation, thus making his compensation depend upon the quantity of produce raised, doubtless to excite him to greater diligence in the discharge of his duties. Such agreements have never been held to constitute a partnership as *between the parties themselves*.

In Dry v. Boswell, (1 Camp. 329,) the owner of a lighter agreed with a person to work it, and to receive for his services one half of the gross profits; held, that such agreement did not amount to a partnership. The cases of Turner v. Bissell, (14 Pick. 192,) and Vanderburgh v. Hall, (20 Wend. 70,) are analagous in principle to the case before us, and furnish illustrations of the distinction between a participation in the profits as profits, and sharing in the profits as a mode of compensation. But it is unnecessary to cite further authorities to this point. The books abound with cases even stronger than the one before us, where it has been held that the parties, *inter sese*, were not partners. See the cases cited in Loomis v. Marshall, 12 Conn. 69, and Story on Part. 68, note 1 to § 45.

3. The second special count is objected to for uncertainty. That sets forth "that in consideration that the plaintiff would furnish three hands, and feed and clothe said servants for the year 1844, and pay all of their expenses and work the same on the plantation of the defendant in Perry County, Alabama, and furnish provisions for himself and his family and said three hands, the lands and mules and horses of said defendant in the capacity of an overseer, he the said defendant agreed and promised to place on said plantation his hands, to wit, the hands owned by him, and live on said farm, and his mules and horses, and to furnish the said hands, &c., placed by him on said plantation with provisions, and said hands with clothing; to pay all expenses of the said hands and mules and to let said plaintiff cultivate said farm until (*with*) said hands and mules so furnished as aforesaid by said plaintiff and said defendant, and raise a crop thereon in said year 1844, for which said defendant agreed and promised that said defendant should have and draw a part of the crop raised on said farm by said defendant with the said hands mules and horses in the year 1844, in *proportion* to the

said hands of said plaintiff so placed on said farm." The plaintiff then avers a compliance in all things on his part to be done by said contract; that he raised with the hands a specified amount of cotton, corn and fodder, his *reasonable share* of which was one third; but that the entire crop was received and used by the defendant. He then avers that one *fourth* part of the crop amounted to the sum of one thousand dollars in value, and that the defendant wholly refused to let him have his part of said crop, or to pay him the said sum, the value thereof.

Having thus copied literally the greater part of the count, let us see whether it is sufficient. Premising that the settled rule upon the subject requires that pleadings should not be insensible, repugnant, nor ambiguous or doubtful in meaning, and that while it is both the duty and pleasure of the courts to discourage mere technical objections, still, parties must be held to observe reasonable certainty, especially in the more substantial parts of the declaration which describe the cause of action. We think the contract, as it is set out in the count, is too vague and uncertain to be supported. What legal liability does the count impose upon the defendant? The plaintiff agrees to contribute three hands, and his services as overseer for the year 1844, and the defendant his plantation in Perry County, and the hands, mules and horses upon the same, each defraying the expenses incident to his several contribution, and, with their hands and stock thus furnished, to raise a crop under the supervision of the plaintiff as overseer in the year 1844. But the count, while it attempts to show that the crop was to be apportioned between the parties, is so vague in its allegations as to furnish no *data* for the division. It says, "*the defendant* should have and draw a part of the crop raised on said farm by said defendant with the said hands, mules and horses in the year 1844, *in proportion to the said hands of the said plaintiff* so placed on said farm." We suppose this is a clerical misprision, and that it should read, the *plaintiff* should have a part of the crop in proportion to the hands furnished by *him;* for otherwise the number of hands furnished by the plaintiff is made to represent the proportion to which the *defendant* shall be entitled, instead of each being entitled according to his contribution. But conceding the error, still we are not furnished with any data so as to enable us to arrive at the defendant's liability. If *he* is to share, or the plain-

tiff is to share, in proportion *to the hands respectively furnished* by them, the number of hands so furnished should be stated, so as to show that the defendant is liable for some specified amount. The plaintiff proceeds to state, however, that one third of the crop was his *reasonable share*. Now whether this is the *proportion* to which he is entitled, making the number of hands respectively furnished the criterion for the apportionment, or whether the pleader means that one third of the crop is a reasonable share, estimating the entire contribution by both parties, the services of the plaintiff and his three hands on the one side, and the hands, mules and horses, and farm, on the other, is left in doubt. Whether, by the term "proportion," as stated in the contract, the plaintiff was to share according to the comparative relation which his hands bore to the *hands* of the defendant, or to the *entire contribution of the defendant*, embracing his horses, mules and plantation, is left in uncertainty. He then avers that one *fourth* of the crop was worth one thousand dollars, and assigns as a breach the refusal of the defendant to allow him his portion of the crop, or to pay him for the one *fourth*. Admitting, as the demurrer does, all the facts stated in this count to be true as stated, the pleader does not enable us to determine what he claims, or to what share of the crop the defendant should respond. To sanction such a vague, ambiguous mode of declaring, would be to strike down the long established rules of pleading, and to involve the courts in embarrassment, while the administration of justice would be rendered uncertain.—See 1 Chitty's Pl., 261, 232, 236-7. The court erred in overruling the demurrer to this count, and this error must reverse the cause.

The questions raised as to the variance between the allegations and the proof, it is unnecessary to notice, since, upon another trial, they may be avoided by the proper amendment.

Let the judgment be reversed and the cause remanded.

WHITESIDE *vs.* JENNINGS.

1. A bond for titles, executed by commissioners who are appointed by the Orphans' Court to sell the real estate belonging to a decedent, conditioned that the commissioners shall make or cause to be made to the obligee a fee simple title to the land, is binding upon the obligors personally, when they exceed their authority and fail to bind the decedent's estate.
2. The obligee's notes given for the purchase money of the land constitute a sufficient legal consideration for the execution of the bond.
3. *It seems*, that the measure of damages in an action on a bond for titles is the value of the land at the time of the breach.

ERROR to the Circuit Court of Benton. Tried before the Hon. L. P. Walker.

THIS was an action of debt by Jennings against Whiteside and others, on a bond executed by the defendants, who had been appointed by the Judge of the Orphans' Court commissioners to sell the real estate belonging to Owen Jenkins, deceased, conditioned that they should make or cause to be made to the plaintiff a fee simple title to certain lands therein described. Suit had been brought and judgment recovered against the plaintiff on his notes for the purchase money, in the name of the payees for the use of the administrator of Owen Jenkins, and the money had been collected and paid to the administrator. The plaintiff proved that after the payment he had requested the defendant to make him a fee simple title to the land, and that the defendant refused, the decedent's title to a part of the land being defective.

The court charged the jury that the execution of the notes for the purchase money was a sufficient legal consideration to support the bond; that the bond was binding upon the defendant personally; that the damages to which the plaintiff was entitled was the value of the land at the time of the breach of the bond; and that the breach occurred at the time of a demand for title, after the payment of the purchase money, and the defendant's refusal, or acknowledgment of inability to make title. There was a verdict and judgment for the plaintiff.

J. B. MARTIN, for plaintiff in error:

1. The defendant was not liable personally on the bond sued on.

When one acts in the capacity of a public agent, and that fact is known to those with whom he contracts, he cannot be held personally liable, unless it is made to appear clearly that it was the understood and received intention of the parties that he should be so bound; and the *onus probandi* in such case is upon the party who seeks to make the obligation a personal one. It is immaterial, too, whether the contract can be enforced against the principal, or is a mere nullity. This is a question with which, in the language of Lord Mansfield, "the court has nothing to do." This exception in favor of public agents is founded upon the most obvious reasons. Were the law otherwise, few persons would be found willing to assume the duties and responsibilities of such agencies. The official character of such agents is usually a matter of general notoriety. The extent of their authority may easily be ascertained by all who have any interest in knowing it, and there is therefore no danger of their imposing on the public by assuming a character to which they are not entitled, as in the case of mere private agents.—Story on Ag., §§ 302 to 307; Macbeath v. Haldimand, 1 Durn. & East, 172; Hodgson v. Dexter, 1 Cranch, 345; 12 Wend. 179; 12 Johns. 444; 9 Mass. 272; 2 Wend. 375; 8 Cow. 191; 3 Conn. 560; 3 Espin. 567.

There is no reason founded either in law or justice, for sustaining this exception in favor of public agents, which does not equally apply to this case. The Orphans' Court is the real vendor. The commissioners are the mere instruments of the court through whom the sale is effected, and they are responsible only to the court. Their office is not voluntarily assumed; it is one which the court may impose upon them and compel them to perform. They are entitled to no compensation for their services. Their interest is not in any manner affected, either by the amount of their sale, or the character of the title which it passes. The extent of their power and authority is defined by law, of which none can claim to be ignorant. The capacity in which they act, and the directions for their conduct, are matters of record in the Orphans' Court, and open to the inspection of all.—9 Ala. 285; 7 ib. 855; 10 ib. 636.

2. There was no legal consideration for the bond to make it personal.

There was no shadow of advantage or benefit accruing to the

defendant, or expected to accrue.—3 Ala. 316; 11 Wend. 106; 1 Dallas, 17; 2 Stew. & Por. 267.

The execution of the notes for the purchase money was not sufficient, as being an injury to the plaintiff. This rule only applies where the injury, trouble or inconvenience, done or suffered by the promisee, is the immediate effect and consequence of the promise relied on. Before it can apply in this case, it must be shown that the plaintiff was induced to make the purchase and execute his notes, in consideration that the defendant would execute the bond and be bound personally by it; whereas the record shows the very reverse to be true.—8 Ala. 131; 12 ib. 124; 3 Conn. 560; 15 Johns. 1; 1 Story on Cont., § 115.

3. The charge requested should have been given. The intention of the parties, when it can be ascertained, constitutes the "pole star" of construction. Nothing can be implied against the express understanding and agreement of the parties.—2 Black. Com. 379; Chitty on Con. 67; Story do., § 231; 13 East. 74; 4 Dallas, 345; 2 Story's R. 122. The mere fact that the real contract of the parties cannot be enforced does not authorize the court to substitute an entirely new contract which can be enforced. And yet this is the effect of the refusal to charge as asked.—Story on Con., § 11; Chitty do. 80; 2 Kent's Com. 477; Powell on Con. 371; 1 Durn. & East, 172; 5 ib. 6; 6 Hill's (N. Y.) R. 550.

4. The plaintiff should only have been allowed to recover the amount of damages actually sustained by him. He should not have been allowed to recover for that portion of the land which the defendant offered to convey, and which was unincumbered.—5 Johns. 49; 11 N. Hamp. 74; 12 Ala. 820; Sedgwick on Dam. 175. The true measure of damages was the purchase money and interest, and not the value of the land.—2 Wend. 399; 2 Black. 1078; 2 Bibb, 415; 16 Maine, 164; 3 Caine's Ca. 111; 4 Johns. 1; 2 Hill, 105; 2 Bibb, 273.

John Foster, *contra:*

1. Whenever a party, by an instrument under seal, undertakes to stipulate for another, if he acts without authority or beyond his authority, so as not to bind his principal, he is personally responsible, even although such was not his intention.—8 Mass. 162; 5 East, 148; 2 Strange, 955. The only excep-

tion is in favor of government agents, contracting on behalf of the public; and even in such cases the agent is personally responsible, unless it clearly appears that he made the contract in his official character, and that the contracting party looks to the government alone.—3 Caines, 69. In this case the commissioners could not have signed the name of their principal, and if they are not bound personally, their contract is a mere nullity.—3 Dev. 179; 8 Mass. 207; 2 Mass. 455; 15 Pick. 428; 9 Johns. 335; 3 Wend. 94; 13 Johns. 307.

When an agent wishes to be excused from the obligation into which he enters, he must affix the name of his principal; if he does not do so, but signs his own name as agent, it becomes his bond, and not his principal's.—2 East, 142; 5 ib. 148; 13 Mass. 406; Story on Ag., § 147; 8 Conn. 19; 5 Mass. 299; 6 ib. 58; 4 ib. 108.

2. The measure of damages was the value of the land.—Watts v. Sheppard, 2 Ala. 447; Pinkston v. Huie, 9 ib. 252. The plaintiff was not bound to receive a title to part, until it was perfected to the whole.—2 Ala. 447.

COLEMAN, J.—The first and most important question presented for our consideration in this case is, whether by law the defendant in the court below can be charged *personally* on the covenant sued on? The covenant is in these words:

"THE STATE OF ALABAMA, BENTON COUNTY.

"Know all men by these presents, that we, Joel Graham, John W. Whiteside and William Champion, commissioners appointed by the honorable the Judge of the County Court of said county, to sell the real estate of Owen Jenkins, deceased, are held and firmly bound unto John B. Jennings in the penal sum of $998, for the payment of which well and truly to be made, we bind ourselves as commissioners jointly and severally, firmly by these presents. Signed and sealed, this 2d of Oct. 1841.

"The condition of the above obligation is such, that whereas the above bounden, Joel Graham, John W. Whiteside and Wm. Champion, have this day sold to John B. Jennings one forty acre tract of land lying in the south-west corner of the 16th section; also, thirty acres of land known as the mill place, all in township 14, range 9, east, in the Coosa land district, on a credit of one and two years, in equal instalments, and have taken

the notes of the said John B. Jennings, with interest from date, as securities; one note payable twelve months after date, for the sum of $248 50 cts., with interest from date, and the other for the same amount, with interest from date, due twenty-four months after date; both notes bear date with this obligation. Now when said John B. Jennings pays off said notes and interest, then the *commissioners shall make or cause to be made to the said John B. Jennings, titles in fee simple to said land above described*, on the happening of which, then this obligation to be void, and not else. Witness our hands and seals, day and date above written. (Signed) JOEL GRAHAM, [seal.]
JOHN W. WHITESIDE, [seal.]
WM. CHAMPION, [seal.]"

I think it must be admitted, upon a proper consideration of the language of the bond, in connection with the other proof in the case, that it was the intention of the defendant to bind the estate of the deceased, in the event of a failure to make the titles, and not to bind himself personally. I think it also evident, that the plaintiff gave his notes and accepted the covenant under the belief that he received a good and effectual obligation in the covenant to make to him a fee simple title to the land. It will be perceived, upon an examination of the case as stated in the record, and of the statute (Clay's Dig. 225,) under which the sale of the land was made, that the defendant had no authority to bind the estate in the manner he attempted to bind it. The question, therefore, occurs, whether the defendant thus failing to bind the estate, thereby became personally liable on the covenant? It is laid down as the general rule of law on this subject, that when a party contracts "*in autre droit*" and fails to bind his principal, by either acting without authority, or beyond his authority, he is to be held personally responsible. The leading American authority in support of this doctrine, is the case of Sumner, adm'r, v. Williams et al., 8 Mass. 208, in which it was held, in substance, that administrators selling real estate by order of court, as in this case, were subject personally to the payment of damages for defect of title, contrary to their intention when they entered into the contract, and when they were to derive no personal benefit from the execution of the trust as administrators by the sale of the estate. There is an able dissenting opinion in the case by Judge Sedgwick, but the doc-

trine held by the majority of the court was subsequently fully affirmed in the case of Whiting v. Dewey, 15 Pick. 433. In this case it was held, that where the guardians of a minor covenanted, in their capacity as guardian, that the father of the minor died seized of the premises, and that they *in their capacity aforesaid*, in right of the minor, were lawfully seized of the premises, the guardians were personally liable on those covenants.

The exception to the foregoing general rule is, where the party contracting is a public agent and contracts on the public account. See the cases of Macbeath v. Haldimand.—1 Durn. & E. 172; Unwin v. Wolseley, 1 ib. 674; Hodgson v. Dexter, 1 Cranch, 345; Brown v. Austin, 1 Mass. 208; Walker v. Swartwout, 12 Johns. 444, in all of which the parties sued contracted on the *public* account, and were therefore held not liable. In all the cases of this class, it will be found that the decisions are based upon grounds of public policy; that is, if agents for the government or the public should be held personally liably on contracts avowedly made by them on public account, few persons would be found willing to undertake such agencies, and the public service might be delayed or prejudiced. I think it is correctly argued, that if the mere intention of the agents not to bind themselves, as shown in this class of cases, could have been deemed sufficient for their defence, the court would not have resorted to the dangerous ground of State policy to relieve them; and that, placing the exception to the rule on this ground alone, goes far to establish the rule itself.

It is strongly urged that the rule bears hardly in this case, as the defendant received no benefit from the contract, and did not intend to bind himself; but the rule has stood the test of time, and is well sustained by reason and authority. The legal presumption is, that the plaintiff was induced to pay the purchase money for the land in consideration of the defendant's undertaking to make a good title, and if the defendant neglected to inform himself as to his personal liability, the defendant, and not the plaintiff, ought to lose by that negligence.

There are many analogous cases going strongly to sustain the foregoing general rule. As in the case of Appleton v. Binks, 5 East, 148, where the attorney *without any authority* stipulated for his principal, and was held personally liable. In Thatcher v. Densmoore, 5 Mass. 595, it was decided that the guardian of an

insane person, who had given promissory negotiable notes to the plaintiff for the *proper debt* of his ward, and expressed in the notes *that he did it as guardian*, was bound in his private capacity. In Barry v. Rush, 1 Durn. & E. 691, where the defendant bound himself *as administrator* to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrators awarded that he as administrator should pay, &c., it was held that he could not plead *plene administravit* to debt on the bond. In these cases it is plain that the parties contracted with the intent not to bind themselves, but to bind their principals only, and yet they were held personally liable, because they had no authority to bind their principals; nor does it appear that they personally received any consideration for their undertaking.

Secondly, it is contended that there was no sufficient consideration for the execution of the bond sued on, &c. In addition to the cases already referred to, I think it is only necessary to advert to the definition of a *legal consideration*, to see that this objection is untenable.—Story, in his work on Contracts, § 113, says, that "a valuable consideration is a legal consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other;" that, in order to constitute a sufficient consideration, it is sufficient that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction.—2 Black Com. 297; Story on Part. 183; Violett v. Patton, 5 Cranch, 142. I think it cannot be doubted, that the execution of the notes by the plaintiff for the purchase money in this case, constituted a sufficient consideration.

Thirdly, it is urged that the true measure of damages in this case is the purchase money and interest thereon from the date of its payment, and that the court erred in instructing the jury to the contrary.

There is some contrariety in the decisions of the courts of the different States on this question. In Kentucky, it has been held that on a covenant to convey, where the vendor is, *without fraud*, incapable of making a title, the rule of damages is the purchase money with interest, &c., but where the vendor acted in bad faith, the plaintiff would be entitled to recover damages for the enhanced value of the land.—McConnell v. Dunlap, Hardin's

R. 41; Patrick v. Marshall, 2 Bibb 40; Fisher's Heirs v. Kay, 2 ib. 434. In New York the same doctrine was held in the case of Baldwin v. Munn, 2 Wend. 399. A different rule is laid down by the Supreme Court of the United States. In Hopkins v. Lee, 6 Wheat. 109, it was decided that in an action of covenant for not conveying land, &c. the value of the land at the time it ought to have been conveyed, was the measure of damages. In this case the following language was held by the court: "The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article has arisen in value, would always have it in his power to discharge himself from the contract and put the enhanced value in his pocket; nor can it make any difference in principle whether the contract be for the sale of real or personal property," &c.

In Hill v. Hobart, 16 Maine, 164, it was held that the proper and legal compensation was the value of the land at the time of a demand made and a refusal or neglect to perform, and that in finding that value, the jury ought to take into consideration the price agreed to by the parties, and such other evidence as there was in the case.—See Sedgwick on Meas. of Dam. 191.

In Pinkston v. Huie, 9 Ala. 252, although the court avoided expressing an opinion on the general question raised here, it was decided that the proper measure of damages upon a bond, conditioned that a *third person* shall convey a title to land, is the value of the land when the title was to be conveyed, with interest on that value to the time of trial.

My own opinion is, that the instructions given were correct, but I conceive it is unnecessary for this court to express an opinion on this point, because if the court erred, as insisted on, the error resulted to the benefit of the defendant. It appears from the record (which purports to disclose all the testimony in the case) that the plaintiff recovered a smaller amount of damages than he would have been entitled to under the rule insisted on by the defendant.

The judgment of the court below is affirmed.

BISHOP'S HEIRS *vs.* HAMPTON.

1. If an entire record, or a part thereof, is lost or destroyed, another may be substituted in its stead upon proof of the contents of that which is lost.
2. But the substitute must be consistent with that part remaining on file, and must not alter or vary its legal effect as evidence.
3. When the petition, upon which a sale of lands belonging to a decedent was decreed by the Orphans' Court, is lost, and the record shows that the grounds upon which the sale was decreed were, that the estate was solvent, and that it would be of infinite benefit to the heirs to sell the land, a petition alleging the additional ground that the land could not be equally, fairly and beneficially divided among the heirs at law, cannot be substituted for that which is lost.
4. The order of the Orphans' Court, allowing the substitution of the petition in such a case, is such a final judgment or decree as will support a writ of error.
5. The parties to the motion in the court below are the proper parties to the writ of error, the plaintiff being one who claims under the purchaser at the sale, and the defendants the heirs at law of the decedent.

ERROR to the Court of Probate of St. Clair.

THE facts of this case upon which the questions of law arise, may be thus stated: Joel Chandler was duly appointed administrator of the estate of Harris G. Bishop, by the Orphans' Court of St. Clair, and on the 11th day of March, 1836, the following order was made by said court and entered upon the minutes of the court: "This day came into court Joel Chandler, administrator of the estate of Harris G. Bishop, deceased, and makes report to the court that said estate is perfectly solvent, and that it would be of infinite benefit to the heirs of said estate to sell without delay the real estate belonging to said estate. It is therefore ordered that his petition be received and an order of sale be made." On the same day an order of publication was made, citing the heirs and all others interested in the land to appear before the Orphans' Court on the first Monday in May next thereafter, and show cause why the sale of said real estate should not be made. On the 24th of July, 1836, the following order or decree was made: "Whereas, the petition of Joel Chan-

dler, sen'r., administrator, was filed in court on the 11th of March, 1836, for the sale of the real estate of Harris G. Bishop, deceased, and forty days notice having been given in the Huntsville Democrat, according to law, and no cause being shown why the sale of said real estate should not be ordered, it is therefore ordered by the court that the several tracts of land described in the administrator's petition, shall be sold on the first Monday of September next, and that Samuel Sauls, Jeremiah Gregory and James Anderson, be appointed commissioners to superintend the sale of the same in all things, pursuant to the requirements of the statute." Nothing further appears of record until September, 1847, when two of the commissioners reported that in pursuance of the order they had sold the land, and that Joel Chandler had become the purchaser for seventeen hundred and ten dollars. In this report the lands are particularly described. On the 5th March, 1849, James Hampton, filed a petition in the Orphans' Court, in which he set forth that he had become the purchaser of the lands from Joel Chandler during his life time, and after Chandler had bought them at the sale ordered by the court, and that the heirs at law of Harris G. Bishop had sued him to recover them. In this petition it is also stated that the application and petition of Joel Chandler to sell the lands of Harris G. Bishop was in writing, but that it had been lost from the file of papers and could not be found; that it described the lands, and named who were the heirs at law of Harris G. Bishop, and prayed a sale for the reason that the lands could not be equally, fairly, and beneficially divided amongst the heirs at law without a sale of the same. The petitioner then proceeds to set out the application and petition of Joel Chandler, that had been filed, and which was lost, and prays that his statement of the application be substituted in lieu of the lost petition, and the record thus perfected. Notice was served on the heirs of Bishop, who appeared and contested the propriety of allowing the substance of the petition filed by Joel Chandler to be substituted in lieu of the petition itself. But their objections were overruled, and upon the testimony of Mr. Ragan, who was the judge of the Orphans' Court when the petition of Chandler was filed, it was decided that the petition of Hampton ought to be granted, and ordered that his statement of the contents of Chandler's petition should be received and filed as part of the record, thus supplying the lost

petition. The heirs of Bishop excepted to the ruling of the Orphans' Court, and bring the case here by writ of error.

J. B. Martin, for plaintiffs in error:

1. The substitution was improperly allowed. The original entry was the best evidence of the grounds upon which the sale was ordered, and it recites but two grounds. The substituted petition alleges the further ground that the real estate could not be equally, fairly and beneficially divided among the heirs at law. This conflicts with the recitals in the original entry, and its admission would be an infraction of the rule that a record imports absolute verity, and cannot be contradicted by parol. An imperfect record may be amended, but this can only be where there is some matter of record to amend by.—1 Bacon's Abr. 251, F; 1 Stew. & P. 167; 9 Por. 252; 2 Ala. 29; 10 ib. 375; 3 Smedes & M. 234; 2 Bibb 248; 2 Marsh. 151; 1 Monroe 218. Again: when amendments are allowable, application must be made for them in a reasonable time, which has not been done in this case. Here the original entry was made in 1836, and the application to amend was made in 1849.—9 Johns. 556; 2 Bay 398; 3 Ham. 486; 1 ib. 375.

2. A writ of error will lie from the order of the court allowing the substitution. It is in effect a final judgment.—Clay's Dig. 297, § 4; 1 Ala. 208. When the power of the courts over amendments is improperly exercised, it may be revised by writ of error.—10 Ala. 375; 15 ib. 79. This case is analagous in principle to a motion, made by a stranger to a judgment, to set aside a sale of land under an execution issued on the judgment, which is revisable on writ of error.—10 Ala. 293; 16 ib. 516.

3. The proper parties are made to the writ of error. The plaintiff in the motion below was the vendee of the purchaser at the sale, and the heirs at law of the decedent were made defendants, and the parties to the writ of error are the same.—1 Stew. & P. 159; 7 Ala. 736; 8 ib. 177; 16 ib. 343; 5 Howard's (Miss.) R. 638.

Rice & Morgan, *contra:*

1. The writ of error should be dismissed. The bill of exceptions should be disregarded. There is no judgment or decree in

favor of Hampton; nothing but an order of the court substituting a petition for the sale of real estate filed in the Orphans' Court in 1836. No writ of error will lie to such an order of the Orphans' Court, especially as against Hampton, nor will a bill of exceptions lie in such case. In the case of McLendon v. Jones, (8 Ala. 298,) there was not only an order of substitution, but a final judgment by the Circuit Court in favor of Jones v. McLendon, for $100 and cost of suit.—Bowen v. Lanier, (N. C.) Term R., 241; White v. Shannon, 3 Ala. 286; 3 Phil. on Ev. 788; Moore v. Hancock, 11 Ala. 245. See Woodruff v. Taylor, (20 Verm. 65,) as to the natue of a proceeding *in rem.*

2. All courts of justice, independent of express legislation, have the inherent power to substitute a judgment, roll or entry, or any other part of their records, when the original record is lost; and the substituted matter becomes a record of equal validity with the original.—McLendon v. Jones, 8 Ala. 298; Lyon v. Bolling, 14 ib. 753; 3 Phil. on Ev. 1066; Dozier v. Joyce, 8 Por. 309.

3. As to the power of the court to allow amendments even without notice, and to enter judgments *nunc pro tunc*, see the following authorities: Hood v. Bank, 9 Ala. 335; Wilkerson v. Goldthwaite, 1 Stew. & P. 167; Mays v. Hassel, 4 Stew. & P. 222; Caffey v. Wilson, 2 Ala. 701. Allen v. Bradford, 3 ib. 282; State v. McAlpin, 4 Iredell's R. 140; Mosseau v. Brigham, 19 Verm. 457, shows "the revisory power" of every court over its own records.

4. The power to allow amendments, or perfect judicial proceedings, is not confined to matters actually appearing of record, but extends to all such matters as should have appeared of record, and extrinsic evidence may be resorted to.—4 Ired. 140; Hood v. Bank, 9 ib. 335; Halford v. Alexander, 12 ib. 288, and cases cited; Caffey v. Wilson, 2 ib. 701; Smith v. Redus, 9 ib. 101; 19 Verm. 457.

It is a sound principle and well established, that the death of a party, after the other party has become entitled to the judgment of the court, shall not deprive the party thus entitled of the judgment, but the court will render the judgment or perfect it, even after such death. No court of justice will permit its own delay to work injury to a party, especially when it has the power to prevent it. Its power to act is not destroyed by such

death of a party.—Halford v. Alexander, 12 Ala. 288, and cases there cited; Green v. Cobden, 36 Eng. Com. L. R. 392; Brown v. Wheeler, 18 Conn. 207.

A sale of land under the order of the Orphans' Court is "the act of the court, through the commissioners as its ministerial agents, over whose acts it retains a controlling power."—Jennings v. Jenkins, 9 Ala. 285.

All that a purchaser at such sale can do, is to comply with the terms of the sale. This was done promptly by the purchaser in this case. It was then due by the court to the purchaser, that it should have required its ministerial agents (the commissioners) to have made their report; but the court did not do this, and the whole delay is the delay of the court. This delay of the court continued until the purchaser sold and conveyed to another, (Hampton,) and until the purchaser died. Whilst the purchaser lived, the court had power to require or receive a report from its ministerial agents. The death of the purchaser did not destroy this power of the court over its own agents. But it was proper that the court, after the death of the purchaser, should do what it ought to have done while he lived. The court was bound to do it, *nunc pro tunc*, or subject itself to the reproach of allowing persons to suffer by its own delay.—Bonner v. Greenlee, 6 Ala. 411, and cases *supra*.

It matters not at what precise time the Orphans' Court did its duty, by causing a report to be made by its own agents, confirming the report and decreeing a conveyance to the purchaser. Whenever these things were done by it in performance of its duty, whether before or after the death of the purchaser, they had relation back to the time when they ought to have been done. They do not derive their validity from the fact that the purchaser is alive when the conveyance is actually decreed and executed, but from the power of the court to complete and perfect a sale of land, which it rightfully made to a purchaser who was alive until he complied with the terms of sale, and thus performed all the law or court required of him.

But for this doctrine of legal relation, there would be no meaning in allowing to courts the power to amend proceedings, to make entries *nunc pro tunc*, to complete and perfect that which they have only partially done. A judgment *nunc pro tunc* has "a retrospective relation," and nothing that has occurred *post*

factum can be presented in opposition to it.—Allen v. Bradford, 3 Ala. 282.

The report of commissioners when made, is like an amended return of a sheriff, and has the same effect "as if it had been entered in due time, as required by law."—Leavitt v. Smith, 14 Ala. 279; Hodges v. Laird, 10 Ala. 680; Allen v. Bradford, 3 ib. 282; Brandon v. Snow, 2 Stew. 255.

DARGAN, C. J.—If an entire record, or a part thereof, is lost or destroyed, another may be substituted in its stead upon proof of the contents of that which is lost. This has been so often decided by this court that the question is not open to controversy.—Joyce v. Dozier, 8 Por. 303; Williams v. Powell, 9 ib. 493; McKenzie v. Bonham, 5 Ala. 608; McLendon v. Jones, 8 Ala. 298. But I have found no case that goes so far as to hold that when a part only is lost, it may be substituted, and its contents shown by parol proof to be repugnant to or inconsistent with the part remaining. And I am entirely satisfied that when it is proposed to substitute a part of a record by parol proof, it must be consistent with the part remaining on file, and not alter or vary its legal effect as evidence. A contrary rule would allow a record to be altered by parol proof, in violation of the maxim, that a record speaks the language of verity, and the parties bound thereby can aver nothing against its truth.

Applying this test to the action of the Orphans' Court, in allowing the petition of the administrator to sell the land of H. G. Bishop, dec'd., to be substituted in lieu of the petition that was lost, I think the court erred; for the entries on the minutes of the court show that the grounds on which the application to sell the land was made, were, that the estate was entirely solvent, and that it would be of infinite advantage to sell the real estate. The judgment entry also shows that a day being set to hear the application, and the heirs at law notified to show cause why it should not be granted, none was shown, and therefore a decree of sale was rendered. The grounds, therefore, upon which the court proceeded to decree a sale, as appears from the record remaining on file, were, that the estate was solvent, and that it would be of infinite benefit to the heirs to sell the land. But the petition proposed to be established by the parol proof shows that the grounds upon which the administrator proceeded to ob-

tain the order of sale, were, not only that the estate was solvent, and that it would be beneficial to the heirs to sell, but also the further ground that the land could not be equally, fairly, and beneficially divided between the heirs at law, without a sale. To allow this petition to be substituted by parol proof, would be to allow a new fact to be added to the record that remains on file, and thus the legal effect of the part not lost would be altered, or varied, by parol proof, in violation of one of the most sacred rules of evidence.—See The Heirs of Bishop v. Hampton, 15 Ala. 761.

2. But it is contended that a writ of error will not lie to the order of the Orphans' Court, allowing the substitution. We cannot agree with the defendant's counsel in this proposition. The substitution of the record of a final judgment or decree is in its nature a final order or judgment, and is conclusive against the party unless reversed or annulled. We entertain no doubt but it may be reversed by writ of error.

Nor is the writ of error defective on account of parties. The defendant in error, who has succeeded to all the rights of the purchaser who bought the land, at the administrator's sale, made the motion to substitute the lost record, and gave the plaintiffs in error, who inherited the land from the father, notice thereof. There could be no necessity for making any other person than the parties to this motion parties to the writ of error.

The judgment of the Orphans' Court allowing the petition to be substituted in lieu of the one that is lost is erroneous, and must be reversed.

BRANCH BANK AT MOBILE *vs.* ROBERTSON ET ALS.

1. When a debtor becomes insolvent, and executes a deed of trust to secure certain of his creditors, a court of chancery will make a *pro rata* distribution of the proceeds among all the creditors who are provided for, when the deed creates no preference among them.
2. A creditor is entitled to the benefit of all pledges and securities

which the principal debtor places in the hands of his surety to be applied to the payment of the debt.

ERROR to the Chancery Court of Greene. Tried before the Hon. W. W. Mason.

IN 1843, Robert C. Macon executed a deed of trust to secure certain of his creditors against liability on debts for which they were bound as sureties for him, some of which debts were due to the Branch Bank at Mobile. John R. Robertson, who was one of the securities provided for, filed this bill on behalf of himself and such of the other secured creditors as would come in and contribute to the expenses of the suit, against the trustee, for a settlement of the trust. The Branch Bank at Mobile propounded its interest in the trust fund by petition to the court, asking to be made a party, and also appeared before the master on the taking of the account, and excepted to his report. The chancellor, on final decree, decided that it was the principal object of the deed to secure the sureties who were provided for against all loss, and as the evidence taken before the master showed that the trust fund in the hands of the trustee was insufficient to fully indemnify them against the debts which they had already paid off, the Bank was not entitled to a *pro rata* share of the fund on the secured debts which were due to it, and still unpaid. The provisions of the deed are fully recited in the opinion of the court.

PIERCE, for plaintiff in error:

I. The bill from the face of it is in effect a creditor's bill, filed against a trustee who has the funds of the debtor in his hands. It prays that the trustee "be decreed out of the trust fund, to apply toward the payment of the debts of R. C. Macon, such ratable share as they may be entitled."

1. Then all the creditors provid d for in the trust should be made parties, or notified and required to produce their claims before the register. As to the proceedings in such a case, see Story's Eq. Pl., § 99, and notes; § 103, 102, 104.

2. The Branch Bank being a creditor named in the deed, should have been allowed to prove her claim before the master.—2 Paige, 19.

II. According to any fair construction of the deed, the Branch Bank was entitled to a ratable share of the trust fund.

The deed enumerates the debts for which the securities are bound; the second debt mentioned is one due to the Branch Bank. It then states the object to be to protect and save harmless the securities on said debts; provides that the debts enumerated shall be paid off and discharged; and if the funds are not sufficient to satisfy all, then the trustee shall appropriate the fund ratably among the several debts and liabilities therein named. So far from saying that any security who may have paid off the debt for which he is bound, should be first paid, the deed provides expressly that he shall be entitled to his ratable proportion.

1. Then this deed is made for the benefit of all the creditors named in the deed, and not alone for the securities.

2. If made for the benefit of securities alone, it is well settled that the creditors are entitled to the benefit of it.—1 Story's Eq. Ju., §§ 502 and 638. This holds good even when the creditor was ignorant of the security given when the debt was incurred.—See 9 Paige, 432-5-6; 2 Sand. Ch. 478. This doctrine is also acknowledged by the court in the case of Toulmin et al. v. Hamilton, &c., 7 Ala. 368.

THORNTON & SEMPLE, *contra:*

The only material question is, what under the facts of the case and the provisions of the deed, should have been done with the money in the hands of the trustee, or raised by the sale? If by the true construction of the deed the sureties were to be protected, then as they have paid out more than the property sold for, there is nothing for the Bank to obtian, and further litigation would be useless strife.

The deed recites the debts of the grantor, and declares the aim and purpose of the deed to be to save harmless and protect the sureties on said debts. This is the prominent and first provision of the deed, and controls any subsequent declarations. In the case presented, that intention of protection to the sureties of the grantor would be frustrated by the *pro rata* distribution of the fund among the whole of the creditors, instead of among the several sureties who have paid out under execution large amounts to the creditors. For the grantor is utterly insolvent,

and cannot pay back to them any part of what they have thus paid out for him, which appears by the bill. It seems to me that the sureties ought to be refunded what they have paid out, and the remainder only divided out, if any, among the creditors.

The object of the deed of trust is clearly to protect the sureties. This then is the general intent, and the concluding terms of the deed show only the manner in which it is to be done, forming the particular intent, which must yield to the general intent.

The term "enumerated debts," must be understood as applying to the debts to be created in favor of the sureties by their paying the debts for which they were liable, or becoming immediately liable to pay the debts on which they were sureties.—See Talliaferro v. Brown, 11 Ala. 702.

CHILTON, J.—The only question in this case is, whether the deed of assignment executed by Robert C. Macon conferred such an interest upon the Bank as entitled it to come in as a beneficiary under the decree and share in the distribution of the trust fund?

After a careful examination of the provisions of the deed, we do not entertain a doubt but that the chancellor misapprehended its import. It is true the deed purports to have been executed for the avowed object of saving harmless and indemnifying the securities of the grantor, against their liability upon certain enumerated demands, among which are the claims of the Bank; but while this is true, it by no means follows that these securities shall have the right to appropriate the fund as they see proper. We must look to the deed and see what direction it gives as to the application of the funds, in the event there should not be sufficient means to discharge the whole of the debts for which they are liable, and against which it proposes to indemnify them. The deed is made for their protection and indemnity, but the manner in which they are to be protected and indemnified is particularly set forth, and we are pleased to see that it accords with strict justice and equality.

The deed, after providing for a sale of the property conveyed, in the event of default of payment of the debts secured by the same, on the part of the grantor, and for the appropriation of the proceeds by the trustees to the payment of all the debts for which the securities were liable, then proceeds as follows: "And

if the fund arising from the sale of the land and property hereby conveyed, should not be sufficient to pay off and satisfy in full all the foregoing debts intended to be secured and paid by this trust, then it shall be the duty of said trustees to appropriate the fund arising from the sale ratably among the several debts and liabilities herein named." And, as if the grantor anticipated the very state of case presented by this record, he proceeded to declare that "If either of the said debts shall have been paid by any of the securities of the said Macon, such security so having paid said debt shall be entitled to his *pro rata* share of said fund." This provision in the deed is too clear to need the aid of argument to show that the fund, being in adequate to discharge all the debts secured, must be apportioned ratably among the several creditors, and the security who has paid any of the debts can receive no greater share than the creditor whom he has paid would have been entitled to.

In the absence, however, of such a provision in the deed for a ratable distribution of the fund, the grantor being insolvent and no preference being secured to any particular creditor, the Chancery Court, which proceeds upon the maxim that "equality is equity," would make a *pro rata* division of the proceeds among all the creditors whose debts are provided for.

But, considered in another view, the decree of the chancellor is erroneous, since it overlooks the well established principle that the creditor is entitled to the benefit of all pledges and securities which the principal debtor places in the hands of his surety to be applied to the payment of the debt.—1 Story's Eq. Ju. § 638; Per Sir Wm. Grant, in Wright v. Mosley, 11 Ves. 22; Per Lord Ch. Cowper, in Parsons v. Briddock, 2 Ver. 608; Toulmin et al. v. Hamilton et al., 7 Ala. 367-8, and cases cited.

Let the decree of the chancellor be reversed, and the cause remanded.

AVERETT *vs.* HORN.

1. When a party against whom a judgment is rendered by a justice of the peace, craves an appeal from the judgment on the day of its rendition, but does not give bond until the sixth day afterwards, being prevented from giving bond on the fifth day by reason of the justice's absence from home, it is error to dismiss the appeal.

ERROR to the County Court of Perry.

A. B. MOORE, for plaintiff in error:

If the plaintiff in error craved an appeal within five days from the rendition of judgment, and executed his appeal bond on the first day after the expiration of five days and before the issuance of execution, it was sufficient, and the appeal should not have been dismissed.—Johnson v. Hale, 3 Stew. & Por. 331; Henderson v. Plumb & Robbins, 18 Ala. 74.

The case of Jones v. Moore, (13 Ala. 296,) does not settle this question. It only decides that the appeal bond in that case was executed within the five days.

I. W. GARROTT, *contra:*

The language of the statute is explicit, that the party aggrieved "may appeal, *first* giving bond," &c.—(Clay's Dig. 314, § 9.) The record shows that the plaintiff "craved" an appeal, but it does not show that the appeal was granted until the sixth day; on the contrary the bond itself recites that the appeal was prayed for and granted on the sixth day.

The case of Johnson v. Hale, (3 Stew. & Por.,) cannot control this case. It was decided before the adoption of Aikin's Dig. in 1833, until which time there was no statutory provision requiring a bond. The case of Henderson v. Plumb & Robins, (18 Ala. 74,) does not apply; for there the party appealing was ready and offered to give bond, but the record here does not show such a state of facts. The case of Moore v. Jones, (13 Ala. 296,) must be decisive of this; for there the precise point made in this case was determined adversely to the plaintiff in error.

COLEMAN, J.—This was an appeal by Averett from a justice of the peace, to the court below.

The bill of exceptions discloses, in substance, that the court dismissed the appeal on the ground that the appellant did not give the appeal bond until the sixth day after the rendition of the judgment; that the appellant "craved" an appeal on the day of trial and after judgment was rendered against him, and that on the fifth day after the judgment, he went to the house of the justice of the peace who rendered the judgment to execute an appeal bond, but that the justice was not at home, by reason whereof he failed to give the bond on that day, but executed it on the day of its date, &c.

The act in relation to appeals from justices of the peace, and which has been in force since the adoption of Aikin's Digest, in 1833, declares, "that any person aggrieved by the judgment of a justice of the peace, may, within five days thereafter, appeal to the next County or Circuit Court sitting for his county, first giving to such person bond with good security, in double the amount of such judgment, conditioned to prosecute such appeal to effect," &c.

Although the statute in this case was not literally carried out by the justice of the peace, yet as the plaintiff was guilty of no default, and in fact did all that was necessary to be done on his part in the premises, I think he should be considered as substantially complying with the provisions of the act, according to its spirit and meaning. It appears that the plaintiff applied to the justice for an appeal on the day of the rendition of the judgment against him, and that his subsequent attempt to give the appeal bond within the time prescribed by law, was defeated by the act of the justice; and in fact that he used due diligence in order to obtain the appeal in compliance with the letter of the law; finally, that a good and sufficient bond was given by the plaintiff only one day after the expiration of the five days prescribed by the law. Under these circumstances, we think the court erred in dismissing the appeal.

We have been referred to the case of Henderson v. Plumb & Robbins, 18 Ala. 74, where it was held, "If an appeal be taken from a judgment of a justice of the peace within five days after it is rendered, it cannot be dismissed because no bond has been executed, if the appellant is ready to give the bond when the motion to dismiss is made." It is not necessary to go to the extent of that decision to sustain the appeal in this case. In

support of his opinion, the judge refers to the case of Johnson v. Hale, 3 Stew. & Por. 331, which was decided on an appeal taken under the act of 1814, which did not direct at what time the bond should be given, and which did not expressly require the appellant to give any bond at all.

The judgment is reversed and the cause remanded.

BROOME ET ALS. *vs.* CURRY'S ADM'RS.

1. Those who will be entitled to the money arising from the sale of property may, if they are capable of making an election, elect to take the property itself in lieu of the money.
2. When money is given to one person for life with remainder to another, the remainderman cannot claim the benefit of contracts made by the tenant for life with the money.
3. A testator by will devised certain real and personal property to one of his daughters, for her sole and separate use; and at her death to be equally divided among those of her children who might then be living. He also bequeathed certain slaves to his wife during her life, and directed his executors to sell them at her death, and divide the money arising from the sale equally among his children, to be held by them as the property given to them was held. After the testator's death, by agreement between the children and their mother, the slaves were divided among the children, they agreeing to furnish their mother an annual support during her life. The slaves which were allotted to the said daughter on the division went into the possession of herself and her husband, and were afterwards sold by her husband. After her death, her children who were minors at the time of the division, brought trover against a remote purchaser from their father's vendee, for the recovery of the slaves. *It was held*,
   1. That the will of the testator only conferred upon the plaintiffs a a legal title, after their mother's death, to the sum of money which might have been allotted to her, as her share, on a sale of the slaves.
   2. That the division did not give them the legal title to the specific slaves which were allotted to their mother.

ERROR to the Circuit Court of Marengo. Tried before the Hon. Geo. D. Shortridge.

THIS was an action of trover brought by the plaintiffs in error against the defendants, for the conversion by their intestate of a negro man slave, alleged to be the property of the plaintiffs. The plaintiffs claimed under the will of their grandfather, which is set out in the opinion of the court at sufficient length. The court charged the jury, that if they believed the evidence they must find for the defendants, and verdict and judgment were accordingly rendered for the defendants.

SMITH, for plaintiffs in error:

1. Where property is ordered to be sold and the proceeds distributed, only a court of equity can consider it done and affix such converted character upon the actual property; indeed, it is called the doctrine of equitable conversion.—2 Lomax on Ex. 169. In this case, therefore, the doctrine cannot apply. Besides, this doctrine only relates to the transmissibility of the property, and no intervention of a court is necessary in the making an election, where one can be made, unless the elector be an infant, &c.—1 Jar. on Wills, 534; 2 Lomax on Ex. 169, § 14.

2. If the doctrine of constructive conversion could be applied, and the necessity of an election to change its character, still there was such an election by all parties in interest as was requisite, and all the parties making it were competent. The females, as to the property, had a right to act as *femes sole*, their property being to their sole and separate use, and their husbands joined with them in the election. Mrs. Bird's children were the only minors, and their mother having died before the termination of the widow's life estate, was not of course then a survivor, and the children taking through her only therefore had no interest whatever.—Burnside v. Wall, 9 B. Mon. 318-29.

3. The life estate of the widow was terminated as effectually by the division, under the circumstances, as it could have been by her death, and it was so terminated for the benefit of all interested.—Ib.

4. The only parties interested in this doctrine of conversion, are the executor of the testator and the legatees under the will; and the most the defendant can do, if he were permitted, would

be to set up an outstanding title in the testator's executor, now extinguished by lapse of time. But he will not be permitted to do this, for as to these matters he is a perfect stranger and will not be heard.—9 Por. 475.

5. Again, the defendants claim through the same common origin (Dorcas Broome) with the plaintiffs, and their proof shows it, and until it appears they claim some other way, they cannot deny the title of that common origin, and no title ever appears to have been in her, except one which vests title in the plaintiffs.

6. The will gives a life estate in the property in those children surviving at the termination of the life estate of the widow, and a contingent remainder in their children living at her death. The possession of the mother was therefore the possession of the plaintiffs, her children, to sustain the title of plaintiffs against the defendant's intestate, who, after the life estate of the mother and his refusal to deliver, was a wrong-doer merely.—13 Ala. 255. The former suit (Broome v. King, 10 Ala. 819,) treats the slave itself as the actual bequest, under the operation of the circumstances.

7. Curry, the defendant's intestate, bought at his own administration sale of Joseph Pack, jr.'s estate, and of course only bought Pack's title, which his administrator, Curry, was bound to know. Now Pack was one of the legatees assenting to the division and receiving his portion of the property under the will; it does not therefore lie in him nor in his vendee to object to such division.

8. But if no election was made, then it was the mere investment of Dorcas of the money belonging to the plaintiffs after her death, in specific property, and in respect to the children's remainder she stood as trustee for them, and the property will be held for the benefit of the *cestuis que trust*, and no court will deprive them of ratifying the investment, as they have done by this suit. They will rather guard the property for them.—6 Ala. 404; 4 Por. 27; 9 B. Mon. 320.

Byrd, *contra:*

1. The plaintiffs show no legal title and are not therefore entitled to recover in this action.—9 B. Mon. 421; Jar. on Wills, chap. "Election."

2. The will of Pack, under which the plaintiffs claim, directs

that his property be sold and the money be divided among his children, giving his daughters a life estate in their share and remainder to their children. Under these facts, the remaindermen have no legal title to the property.—See same authorities.

DARGAN, C. J.—The first and the material inquiry in this case is, does the evidence show a *legal* title to the slave in the plaintiffs. By the will of Joseph Pack, sen., certain property, real and personal, was given to Dorcas Broome, a daughter of the testator, for life, for her sole and separate use, and after her death to be equally divided amongst the children that should be *alive at her death*. The testator, after making provision for his other children, bequeathed the residue of his property to his wife during her life, and directed his executors to sell the same at her death and divide the money arising from such sale equally amongst his children, to be held by them as the property respectively given them by the will was to be held. The residue of the testator's estate, given to his wife for life, consisted principally of slaves, one of which was Tom, the slave in controversy. Shortly after the death of the testator, owing to the old age of his widow, the slaves were divided amongst the children, they stipulating to pay the widow, their mother, a certain annual sum during her life. Tom, the slave sued for, with some others, upon the division, fell to the lot of Dorcas Broome. He went into her possession, or into the possession of her husband, who after retaining him in possession for a year or two, sold him. He was again sold and finally purchased by the defendant's intestate. At the time of the division alluded to, some of the plaintiffs were not born, and none of them of age. Mrs. Broome is now dead, and the plaintiffs, except James C. Bradford, who married her daughter, are her children. These are the facts upon which arises the question, have the plaintiffs shown a legal title to the slave? We cannot hesitate to say that they have not. By the will of the testator, they can make claim to nothing except to the sum of money that should or would have been allotted to their mother, upon the sale of that portion of the testator's estate given to his wife for life; but through this will they obtained *no legal title* to any part or portion of the property itself; nor can the division of the slaves amongst the children of the testator give to the plaintiffs a legal title to the specific slaves

allotted to their mother. We do not intend to deny the general rule, that those who will be entitled to the money upon the sale of property, may, if they are capable of making the election, elect to take the property itself in lieu of the money; and I admit that if the property be personal, a party coming into possession of his share would have a legal title to it. But I look upon the division of the slaves as giving the plaintiffs no more or other right than if their mother had received her portion of the money, and then purchased slaves with it; and in such a case, it is certain that the plaintiffs would not be *legally entitled* to the slaves so purchased. Indeed, it may be well doubted whether they could claim even an equitable title to the slaves, in the case we have supposed; for I do not see why the tenant for life of money, who is entitled to its possession, may not use it as he sees fit in the purchase of property, unless those in remainder restrain him on the ground of danger to their ulterior interest; nor can I conceive how the remaindermen can, even in equity, claim the benefit of his contracts as their own. The tenant for life is entitled to the use of the money; and if he purchases property with it, to give the remaindermen the specific property and not the money would be to give them, to some extent, the use and benefit of the money during the life of the tenant for life. In the case of Black v. Ray, 1 Dev. & Bat. Eq. 443, one having a life-time estate in slaves sold them, and with the proceeds bought others; those in remainder, after the death of the tenant for life, filed their bill to recover the slaves so purchased, on the ground that they were purchased with the money to which they were entitled after the death of the tenant for life. The Supreme Court of North Carolina denied their title to the specific property, but allowed them a lien on the slaves to the extent of the money to which they were entitled, in consequence of the sale of the slaves by the tenant for life. This case shows that those in remainder cannot claim the benefit of contracts made by the tenant for life, with money to which he was entitled until his death. The case of Palmer v. Wakefield, 3 Beav. 227, in effect holds the same doctrine.

It is not, however, necessary to decide, in this case, whether the plaintiffs could claim the specific property by bill in equity, or a lien upon it, in the hands of a *bona fide* purchaser, for the suit is at law, and they must show a legal title, and this we

are satisfied they have not done. They only show a legal title under the will of their grandfather to a sum of money, after the death of their mother; this is a legal debt against her estate, and if they would pursue property purchased with the money, or received in lieu of it, they must resort to a court of equity. They cannot be permitted to recover the property itself at law.

This view shows that there is no error in the charge of the court, and the judgment is consequently affirmed.

ROY *vs.* SEGRIST ET ALS.

1. When a will is admitted to probate without notice having been given to those who are entitled to notice, the probate will be set aside on their application to the court.
2. In such case the party who was entitled to notice may propound his interest to the court by petition, and be made a party to the proceedings so as to sue out a writ of error.
3. The widow *and* next of kin of a decedent are entitled to notice of an application to admit his will to probate. The disjunctive conjunction "*or*," as used in the statute, (Clay's Dig. 303, § 34,) is a misprint for "*and*."

ERROR to the Court of Probate of Macon.

JACOB ROY, an infant, by his next friend, petitioned the Court of Probate to set aside the probate of the last will and testament of his grand father, Jacob Segrist, deceased, alleging that he was one of the testator's heirs at law, and that notice had not been given to him of the application to admit the will to probate. The executors appeared and opposed the petition. The court refused to set aside the probate, but allowed the petitioner to be made a party to the proceedings previously had, and he now sues out a writ of error.

SEABORN WILLIAMS and BELSER & HARRIS, for plaintiff:

1. We assume that it was the duty, under the law, of the executors, when they offered the will for probate, to propound the

will in writing, with the facts necessary to make it a valid will, and in the same writing to set forth and disclose the names of those entitled to participate in the estate under the statute of distribution, as well as those provided for in the will, and to state which of them are of full age, and which minors. In this mode of procedure the cause of action is distinctly set out, and the names and ages of defendants are given to the court. It is like the commencement of any other suit, and should be subject to the same rules. It would then be the duty of the court to order citations to all living within the jurisdiction of the court, and to appoint guardians *ad litem*, for the minors. To such a mode of procedure no objection could be urged. The courts have not said that the omission to do this would be error, but have said it is the most convenient mode of practice, and have, in quite clear language, intimated that this should be done.

2. When this is omitted, it is within the power of the court, when the fact is brought to its notice at an early stage of the proceedings, to open and set aside a judgment, and allow the minor to be made a party to contest the will. If in the power, it may be that it has the discretion to open the judgment or not. It is imperative on the court, in a case like the present, and not matter of discretion; and from the facts set out in the judgment on the petition, it sufficiently appears that the judgment should have been opened; the necessity of the case is sufficiently shown. And it is no reason to the contrary that the statute gives a remedy in equity.

The statute requires notice to the widow or next of kin. It is contended, on the other side, that the meaning of this statute is, that where there is a widow, she alone is entitled to notice; if no widow, then the next of kin. If this is the meaning of the statute, it is unmeaning. A widow can get rid of the effect of a will by a mere dissent from it, whilst the next of kin are given the right by law to contest. We insist that in this place "or" means "and," and in this way we get at the true meaning of the act alluded to. We go further, and say, that unless the statute declared, in unmistakable words, that the next of kin should not have notice, the next of kin would be entitled, and more especially a minor.—Hill v. Hill, 6 Ala. 166; Shields v. Alston, 4 ib. 248; Watson v. May, 8 ib. 177; Acts of 1849-'50, 26, § 8; Singleton v. Singleton, 8 B. Mun. 340; 5 Sm.

& M. 82; Bothwell v. Hamilton, 8 Ala. 464; Boyet v. Kerr, 7 ib. 15; Lee v. Browning, 15 ib. 496; Hilliard v. Benford, 10 ib. 985; Wilson v. Wilson, at June Term, 1850; Savage v. Benham, 11 Ala. 55; Harrison v. Harrison, 9 ib. 179.

Clopton & Ligon, *contra:*

All that the statute requires is that the widow "or" next of kin, either, should be summoned. This construction is supported by the following considerations:

1. The words "widow *or* next of kin" are the identical words used in the statute regulating the grant of letters of administration.—Clay's Dig. 220, § 1. This latter statute was copied from the English statute on the same subject, and when using these words, the Legislature intended the same construction to be given to them which had always been done. As to the construction of this statute, see 2 Stephens' Nisi Prius, 1871; Fawtry v. Fawtry, 1 Salkeld 36, where it is ruled that letters of administration may be granted either to the widow or next of kin, or both, at the election of the ordinary. This view is also supported by the fact that the same necessity for citation exists on the application, either "for the probate of any will," or for letters of administration, (Clay's Dig. 203, § 34,) showing that the Legislature had in contemplation, at the time of the passage of the statute now under consideration, the prior act of 1806, regulating the grant of administration; and therefore, where the same words were used, intended the same construction to be given to them in both acts. Certainly it cannot be contended that it is necessary to give notice of an application for letters of administration to minor grand children when there were surviving children, or that guardians *ad litem* should be appointed. If it is not necessary in the case of an application for letters of administration, it cannot be upon an application for the probate of a will, both being governed by the same statute.

2. The language of the statute in the matter of nuncupative wills is different; the word "and" is used instead of "or," these wills being regarded with less favor by the law.—Clay's Dig., 597, § 3.

3. The meaning of a statute is educed by the same rules of construction as of any other instrument. *Prima facie*, it is understood to mean what its language imports, and the word "or"

is never taken to mean "and," unless the literal construction is insensible, or the statute would be void for uncertainty.—McGraw v. Davenport, 6 Por. 332; Hilliard & Wife v. Buford's Heirs, &c., 10 Ala. 997, dissenting opinion by Justice Ormond, and cases cited by him; Stephens' Commentaries 732 and 627; Bartlett & Warring v. Morris, 9 Por. 268.

4. No injury accrues to the heirs by a failure to give notice, as they can contest the validity of the will by a bill in chancery.—Clay's Dig. 598, § 15. And the probate of a will in the Probate Court is not *prima facie* evidence in a contest in the Chancery Court.—Johnson v. Glascock, 2 Ala. 234.

5. At common law a will was probated in the common form, and in the solemn form. In the common form no citation was necessary.—1 Wms. on Exr's. 188. The probate in the Chancery Court is given in lieu of the solemn form at common law.—Johnson v. Glascock, 2 Ala. 234. This statute is an innovation of the common law, and must be construed strictly.—Lock v. Miller, 3 Stew. & P. 13. Nothing more is required to be done by this statute than a strict construction of the same requires.

6. In none of the decisions of this court concerning this statute did the testator leave a widow, and in that respect the facts of all of them differ materially from this case.

CHILTON, J.—We entertain no doubt upon the point made by the counsel for the plaintiff in error, that it was the duty of the Judge of Probate, if the will was admitted to be proved in the absence of notice to the next of kin, to set aside such probate upon the application of any one of such kin, provided the law requires them to be notified.—Hill v. Hill, 6 Ala. 166-8-9; Shields v. Alston, 4 ib. 248; 5 Sme. & M. 82. Such is the constant practice of the Ecclesiastical Courts of England. It is also settled, that the next of kin, if entitled to notice, may come by his petition into the Probate Court, propound his interest and be made a party so as to sue out a writ of error.—9 Ala. 177; 15 ib. 495. So that the only question involved in this case, about which we could have any difficulty, relates to the construction of the 8th section of the act of 1821, as printed in Clay's Dig., p. 303, § 34, which requires the clerk to issue citation, that the sheriff may summon the widow *or* next of kin to contest the application for probate of the will, &c.

Were we required to construe this statute, as above stated in the disjunctive form, with regard to notice, we should be strongly inclined to hold against the letter, that the will of the Legislature, as deducible from the body of our acts relating to this subject, and in consonance with their true *sense* and *reason*, was, that both the widow *and* next of kin, being interested in the estate, should be notified of the application to prove the will which makes a disposition of such estate.—Easton v. Studd, 2 Plowd. 459, and note 465.

But it is unnecessary to go into this question, since the word "or" in the statute as copied in Clay's Digest is a misprint. The statute reads, "the clerk shall issue a citation requiring the sheriff to summon the widow *and* next of kin," &c.—See the whole act correctly set out in Toulmin's Digest of the Laws of Ala., p. 191 to 200. It has moreover been held by this court that notice of the application for proving the will must be given to the next of kin, if residing in this State, and that this is required by "the express language of the statute."—Lee v. Browning, 15 Ala. 496; Shields v. Alston, 4 ib. 252.

Let the decree of the Probate Court be reversed and the cause remanded for further proceedings.

CARTER & WIFE ET ALS. *vs.* BALFOUR'S ADM'R.

1. A bill is not multifarious which is filed by a single complainant as administrator *cum testamento annexo* of two estates which are so blended and so nearly the same that it is necessary to proceed under both wills at the same time, and which asks the direction of the court, for the complainant's protection, in the construction of the wills, the distribution and administration of the estates, the establishment of certain charitable bequests contained in one of the wills, the marshalling of the assets, and, contingently, contribution from the legatees for the payment of debts.
2. To such a bill all persons interested in the two estates, either as legatees or distributees, are proper parties defendants.
3. When a pecuniary legacy, bequeathed to children who die during

infancy leaving no issue, brothers or sisters, is received by their father after their death, his title is *prima facie* good, and requires no action of the court to settle it; and therefore the personal representative of the infants is not a necessary party to a bill filed by their father's administrator, asking the direction of the court in the construction of his will, the establishment of certain charitable bequests created by it, the marshalling of the assets, distribution of the estate, &c.

4. A clause of a will in these words, viz: "*After my debts are paid, the remainder of my property of whatever kind or nature,* I give and bequeath to my beloved wife," &c. does not conflict with, or destroy a preceding clause containing a bequest to certain benevolent societies. The word "*remainder*" in the subsequent clause must be construed to mean the residue of the testator's estate after deducting the previous bequests and paying debts.

5. In such case, the wife takes the whole estate charged with the payment of the charitable bequests at her death.

6. A bequest to "the Baptist Societies for Foreign and Domestic Missions, and the American and Foreign Bible Society," is valid and sufficiently specific; and if societies can be found, which were organized and known by those names at the time of the testator's death, they will be considered the societies referred to in the will, and capable of taking the bequest, whether incorporated or not.

7. But if such societies did not exist at the time of the testator's death, or cannot now be found, the bequests must be considered and disposed of as lapsed legacies. The doctrine of *cypres*, as applied to bequests to charitable uses, is not recognized in this State.

8. The court of chancery has jurisdiction over bequests to charitable uses by virtue of its original common law powers, without claiming prerogative powers, or invoking the aid of the statute of 43 Elizabeth.

9. Whether the statute of 43 Eliz. is in force in this State—QUERE?

10. *It seems*, that English statutes passed before the emigration of our ancestors to America, which were applicable to our situation, and not inconsistent with our institutions and government, constitute a part of the common law, and are in force (unless repealed,) in all the States of the Union.

11. When a testator bequeathes the whole of his estate, after the payment of his debts, to his wife, charged with the payment, at her death, of a pecuniary legacy to certain charitable societies, and the wife afterwards by her will disposes of the whole personal estate in specific legacies, and leaves the real estate undisposed of, the real estate must first be subjected to the payment of the debts and charitable bequests.

ERROR to the Chancery Court of Talladega. Tried before the Hon. D. G. Ligon.

THIS bill was filed by William McPherson, as administrator of the respective estates of John O. Balfour and his wife Regina Balfour, against all those who were interested in the two estates, either as legatees or distributees. It alleges that John O. Balfour died in Talladega county in January, 1843, after having executed his last will and testament; which was duly admitted to probate after his death. The clauses of the will which are involved in the questions presented by the case are in these words:

"ITEM.—I give to my sister, Emily J. Balfour, a life right in my negro boy Mike; also such articles as she and my wife may agree upon, to the value of one hundred dollars.

"ITEM.—I give one thousand dollars, to be paid at my wife's death, and to be divided in equal proportions betwixt the following Benevolent Societies, viz: the Baptist Societies for Foreign and Domestic Missions, and the American and Foreign Bible Societies; and at my sister Emily's death, if the boy Mike given to her during her life-time be alive, he shall be sold to the best advantage, and the proceeds of the sale equally divided between the societies above named.

"After my debts are paid, the remainder of my property of whatever kind or nature, I give and bequeath to my beloved wife, Regina Balfour, including the land whereon I now live," &c. (describing it.)

"I appoint my wife sole executrix of this my last will and testament," &c.

After the testator's death, said Regina took possession of all his estate, both real and personal, but never qualified as executrix or administratrix. In June, 1843, she also died, after having made her last will and testament, which was only attested by two witnesses. Letters of administration *cum testamento annexo* on the estates of said Regina and John O. were granted to complainant, and he files this bill asking the direction of the court in the construction of the will of John O. Balfour, the distribution of the two estates, the marshalling of assets between them, and, contingently, contribution from the legatees for the payment of debts. The bill further alleges, that in 1840, Rich-

ard Wilkes, of South Carolina, who was the father of said Regina, died, having bequeathed by his last will and testament the sum of $1500 each to Theodore Balfour and Alice Balfour, infant children of said John O. and Regina, which he directed should be invested in real estate, in which said Regina should have a life-estate; that he also bequeathed to said two children, two negroes, Moses and Hezekiah, the profits of whose labor said Regina was also to enjoy during her life; that the testamentary guardian appointed for the children never qualified; that both the children died in infancy leaving no issue, brothers or sisters; that said two negroes were delivered to John O. Balfour by the executors of said Wilkes, and were afterwards specifically bequeathed by said Regina in her will; that the pecuniary legacies were never invested in landed estate, but a portion thereof ($1350) was paid to John O. in his life-time; that the executors of Wilkes refuse to pay the balance to complainant, insisting that it is to be regarded as real estate, and therefore descends to the heirs at law, instead of the personal representatives. The bill charges that the real estate which was devised by said John O. to Regina, and which did not pass by her will on account of its defective attestation, is first subject to the payment of the debts of said John O. and Regina, and the aforesaid pecuniary legacies, and if it is insufficient, that the legacies must abate. The bill prays that "all parties interested in the respective estates and wills both as heirs and distributees," may be made defendants, and also the charitable societies named in said will, when found. The bill also prays, that if such societies as those named in the will cannot be found, then the legacy to them may be distributed among such other incorporated societies as are most nearly allied in their organization, objects and designs to those named in the will.

The defendants demurred to the bill, for multifariousness, for misjoinder of complainants, for want of proper parties defendants, and for want of equity, but their demurrer was overruled. In their answers they admit most of the material allegations of the bill, but they insist that the legacies to the charitable societies are void, and that the residuary personal estate is the proper fund for the payment of the debts of said John O. Balfour.

The chancellor ordered a reference to the master to ascertain the state of accounts between the two estates, the amount of as-

sets and debts of each, &c. By final decree he declared, that as to the bequests to the charitable societies, it was the duty of the court to establish them, and to appoint a trustee who might hold the fund for their benefit, if they could be found in a reasonable time; that the real estate, bequeathed by John O. Balfour to said Regina and undisposed of by her will, must first be subjected to the payment of debts and the charitable bequest, and that the specific legacies could not abate until it was exhausted; that the legacies bequeathed by Wilkes to Theodore and Alice, so far as the same had been received by John O. Balfour and used by him, must be regarded as personal estate; that the balance remaining in the hands of the executors was out of the jurisdiction of the court, and would pass, as real estate, to the heirs at law of Mrs. Balfour under the statute law of South Carolina. The legacy of $1000 to the charitable societies was ordered to be paid into court.

The errors assigned are,

1. The overruling of the demurrer;

2. The establishment of the charitable bequests;

3. Charging the real estate with the payment of the debts and charities;

4. Decreeing that the portion of the legacy bequeathed by Wilkes to Theodore and Alice Balfour which was received by their father, was personal estate;

5. Decreeing that the balance of said legacy was real estate, and not subject to the debts and charitable bequests;

6. Rendering a final decree without the presence of the personal representative of said Theodore and Alice Balfour.

White & Parsons, and Woodward, for plaintiffs in error:

1. The bill is multifarious. It asks the court to establish the bequest to the charitable societies, and administer it according to the doctrine of *cypres;* to direct the complainant in its administration; to compel contribution among the legatees; and to make the executors of Wilkes account with complainant.—9 Ala. 351. If complainant was entitled to recover the fund in the hands of Wilkes' executors, he could only sue in the Court of Ordinary or the Circuit Court of South Carolina; and there is no connection between that part of the bill and the establishment of the charity, or contribution among the legatees.—8 Ala. 694.

2. There is a misjoinder of complainants. Regina Balfour having never qualified as administratrix of John O., all the property belonged to his estate. Therefore the complainant, as administrator of Regina, either had no interest at all in it, or, if he had any interest, it was in conflict with the charitable bequest. A party having an interest as complainant may sometimes be joined as defendant, but the idea of joining a party as complainant, whose interest conflicts with every prayer in the bill, is an anomaly in pleading.

3. The personal representatives of Theodore and Alice Balfour should have been brought before the court, and the bill is defective without them. The bill involves litigation respecting property which was theirs, and there can be no decree unless they are represented. For this error the decree should be reversed.—16 Ala. 629.

4. The bill is defective in not showing property in John O. sufficient to satisfy the charitable bequests. The two negroes bequeathed by Wilkes to Theodore and Alice cannot be appropriated to this charity for want of their administrators; and the real estate particularly mentioned in the will is by it specifically devised to Regina, and therefore not liable to the charity.—10 Gill & Johns. 143; 2 Brock's R. 185; 3 Munf. 514; 6 ib. 87; 7 Paige, 421; 2 Jar. on Wills, 529.

5. The bill is also defective in not alleging that the property sold by the complainant was insufficient to pay the charities and the debts of John O. *alone*. It does allege that the proceeds were not enough to pay the debts of both John O. and Regina, but this is not sufficient; for the complainant had no right to apply the money to the payment of Regina's debts, and if he has done so he cannot ask the aid of this court; and if he has not thus applied the funds, he cannot ask this court to abate the legacies of one estate for the purpose of paying its debts and establishing a charitable bequest of another.

6. But it is contended, that the bill was rightfully retained to establish the charitable bequests, if for no other purpose. There is nothing in the bill to show that the charity was resisted by any of the legatees, and therefore there was no necessity to call in the aid of chancery. But the bequest itself is void.

1. Because it is repugnant to the last clause of the will, which gives "the remainder" of the estate, after the payment of the

testator's debts, to his wife, Regina. The language of the residuary clause, "the remainder of my property of whatever kind or nature," has the legal effect of conveying the absolute property to the devisee—(4 Kent's Com. 535, (5th edit.;) 2 Jar. on Wills, 190;) and such was the testator's manifest intention. But if this bequest of $1000 is supported, it is an incumbrance hanging over the whole estate, and reducing the absolute property in the devisee to a mere life estate. It is a charge upon the estate, and not upon the person. It is settled too, that when a devisee is directed to pay debts, he takes the fee; otherwise the mere life estate might not remunerate him for the debts which he pays.—10 Wheat. 231; 24 Pick. 129; 2 McCord's Ch. 177. The residuary clause then conflicts with any legacy which would convert the devisee's interest into a life estate.—16 Ala. 184; 1 Jar. 411.

2. Because our courts of chancery have no jurisdiction to establish charitable bequests, when there is no person *in esse* to take, no trustee appointed, and the charity is of an indefinite nature. The American cases which affirm the doctrine of the equitable jurisdiction of courts of chancery over charitable bequests, are 17 Serg. & R. 88; 4 Dana, 357; 9 Cow. 437; 7 Verm. 241; 24 Pick. 152; but none of these cases go to the extent necessary to maintain the bequest in this case. Here there is no trustee, no person, natural or artificial, capable of taking, and the charity is of an indefinite nature. The proof fails to show that there are any such associations as those named in the will, and the bill invokes the doctrine of *cypres*.

Of the American authorities above referred to, two of the States, Massachusetts and Kentucky, place the doctrine upon the statute, 43 Elizabeth, which they recognize. But even in Kentucky the doctrine of *cypres* is repudiated. North Carolina too has decided in favor of the jurisdiction, but it is upon the authority of 43 Eliz., and the doctrine of *cypres* is not carried out.—1 Hawks' 96; 1 Dev. Ch. 276; 2 Ired. Eq. 255. On the other hand, Maryland, Virginia and Connecticut have decided against the original jurisdiction of chancery over charities.—5 Har. & Johns. 392; 3 Leigh, 450; 4 ib. 327; 3 Peters' 484; 6 Conn. 293. The case of Vidal v. Mayor of Philadelphia, (2 Howard, 128,) is no authority to support this bequest, for in that case there was a corporation capable of taking; and that

distinguishes the case from 3 Peters' 484, where a bequest precisely analogous to this was held void. The preponderance of American authority is clearly opposed to the doctrine of equitable jurisdiction of such cases.

7. But if chancery has jurisdiction, the Attorney General was a necessary party.—1 Dan. Ch. Pr. 172; 1 Eng. Ch. R. 21; 4 Viner's Ab. 500. If it is said that the Attorney General is only a necessary party in England as the representative of the King, and therefore an unnecessary party here, then the court loses its jurisdiction; for the King is the source of the jurisdiction of chancery over charities.—Jeremy's Eq. Pl. 234; 2 Vern. 342.

8. But if the charity was good, and the jurisdiction of the court over charities admitted, still the court cannot, and will not undertake to supervise a charity to be administered by a trustee which, if any where, is in the State of New York, as the bill itself shows.—2 Roper on Leg. 147.

COLEMAN, J.—John O. Balfour, late of Talladega County, departed this life in January, 1843, leaving his will, so much whereof as it is material to consider is in these words, viz.:

"Item: I give to my sister Emily J. Balfour, a life right in my negro boy Mike, also, such articles as she and my wife may agree upon to the value of $100.

Item: I give $1000 to be paid at my wife's death, and to be divided in equal proportions, betwixt the following benevolent societies, viz.: The Baptist Societies for Foreign and Domestic Missions, and the American and Foreign Bible Society; and at my sister Emily's death, if the boy Mike, given to her during her life time, be alive, he shall be sold to the best advantage, and the proceeds of sale equally divided between the societies above named.

After my debts are paid, the remainder of my property, of whatever kind or nature, I give and bequeath to my beloved wife, Regina Balfour, including the lands whereon I now live, &c.

I appoint my wife sole executrix of this my last will and testament," &c.

Regina Balfour, after taking possession of all the estate of John O. Balfour, but previous to any probate of his will, died in June, 1843, leaving her last will, by which she disposed of all her estate. Her will being attested by only two witnesses, was

good only as to the personalty therein bequeathed, and void as to the real estate. After the death of Regina Balfour, both of the wills were admitted to probate in the County Court of Talladega County, and letters of administration, with the wills annexed, on both estates, were granted to William McPherson. By him this bill was subsequently filed, asking the aid and directions of the court in the execution of the trusts created by the wills.

The bill is demurred to, first, for alleged multifariousness and misjoinder of defendants.

The object of the bill is to ask the court to place a construction on the wills, to decide on the validity of the bequests, to direct the marshalling of the assets of the estate, and contingently, to require contribution from the legatees, if necessary, to pay the debts of the estate. With this view, I think the bill of the complainant properly made a full disclosure of all the facts connected with the case, and made all the persons interested in the estate, parties defendants.

Secondly, for misjoinder of complainants, alleging that the complainant appears as the representative of two estates, between which estates there is a conflict of interests, &c. There is but one complainant, and he sues here to protect his personal interest, by asking the court to guide him in the administration of the estates, the interests of which are so blended and so nearly the same, that it was necessary to proceed under both wills at once.

Again: it is insisted that the representatives of Theodore and Alice Balfour should have been made parties defendants. This would have been necessary, if the chancellor had assumed jurisdiction over that part of the legacy still due them by the will of Richard Wilkes, and which remains in the hands of his executors, John W. Wilkes and Joseph Carter, in South Carolina. To that part of the legacy which was paid and delivered to John O. Balfour in his life time, viz., the sum of $1350 and the two slaves, Hezekiah and Moses, I think John O. Balfour's title at least *prima facie* good, and not requiring any action of the court to settle it, and it was therefore unnecessary to make the representatives of the infants parties. John O. Balfour being the sole heir of his infant children previously deceased, and being in the possession and enjoyment of the property at the time of his death, there was no ground to question his title.

1. It is contended that the charitable bequests to the benevolent societies are void, because they are repugnant to the last clause of the will, and that they come under the rule of construction of wills, that if two parts or clauses of a will are so utterly inconsistent with each other that both cannot stand, the latter must prevail. The correctness of this rule is not questioned, but it is not considered as applicable in this case. The word "remainder," in the last clause, must, I think, be considered to mean the remainder of his estate left after taking out the previous bequests to Emily Balfour and the societies, as well as the amount necessary to pay the debts. The bequest to Regina Balfour is in effect a gift of all the estate, except said legacies and the amount necessary to pay the debts. The language of the will, I think, readily admits of this construction, without being compelled to resort to the known rule, that if possible, we must give to the whole instrument a construction that will render every part of it effectual, *ut res magis valeat quam pereat.*

The great rule in the construction of wills is, that the intention of the testator must govern, that the intention of the testator must be sought after and carried out, if not inconsistent with the law of the land. Can it be doubted, here, that the testator intended to make the bequests to the benevolent societies? If not, why did he make the second clause in his will? Or if, after making the bequests, it may be supposed he wished to revoke them, could he not find language to effect his purpose, without leaving the matter to remote inference or equivocal argument?

It is admitted that the last clause of the will making the bequest to the wife, is not inconsistent with the previous bequest to Emily Balfour. Then why should it be considered inconsistent with the charitable bequests? It would seem that if the last clause is repugnant to and necessarily repealed the charitable bequests, it necessarily repealed the bequest to Emily Balfour; for the two bequests occupy the same position in the will, and the reason for considering one revoked is equally applicable to the other.

The following rules tend strongly to sustain the charitable bequests in this case: That the general terms in the latter part of a will should not render void the specific devise before made, and that general words may be restrained to make the whole will consistent.—6 Ves., jr., 129; 7 ib. 403; 10 ib. 595-7;

Bac. 341; and again, general and doubtful words in a will shall not alter an express devise before made, nor carry any thing contrary to the apparent intent, (7 Bac. 342,) nor express dispositions be varied by inference or argument from other parts of the will.—Wms. on Ex. 716; 1 Ves., jr., 269; 8 ib. 42.

It is also insisted, that to sustain the charitable bequests, would, in effect, restrict the whole of the estate bequeathed to Regina Balfour to a life estate, because the incumbrance of the charity would apply alike to every part of her bequest, and that this would defeat the intention of the testator, which was to give her the property in fee simple.

To this it may be successfully replied, that there is no rule of law to prevent the testator from charging the whole of the residuary estate with the payment of the legacy, or from making it payable at his wife's death; that it was clearly his intention to do so, and that Regina Balfour took the estate with the charge upon it, and as a necessary consequence, when the charity was payable, at her death, her representatives were bound to pay it. I know of no law preventing a person from binding his representative, either expressly or impliedly, to pay a debt at his death.

2. It is insisted that the bequests must fail because the benevolent societies are merely voluntary associations, unincorporated and incapable by law of taking the bequests, and that there is no trustee to take for them; and further, that the object of the charities is too vague and undefined to be sustained by a court of equity.

The bequests are, "to the Baptist societies for Foreign and Domestic Missions," and "to the American and Foreign Bible Societies." I think these descriptions sufficiently specific, and if societies can be found which were organized and known by those names at the time of the testator's death, they should be considered the societies referred to by the will, and capable of taking the bequests, whether incorporated or not. In making the gifts to the societies by their names, I think it clearly and necessarily inferrable that the gifts were intended to be made to them in their aggregate capacity, and for the purposes for which they were organized, and that the testator could not have intended the gifts for the individual members of the societies, or he would have made the bequests to them by their individual names in the ordinary way. It must be presumed that the testator

knew for what object the societies were formed, and that he intended to have the funds applied to that object.—4 Wheat. R. 28. It is like "a devise to a college or any institution known by name; it is presumed to be for the purposes intended by the founder." In such cases, there can be no reasonable doubt as to the intention of the testator; it therefore need not be more specifically made known. It appearing satisfactorily, then, that the testator intended to create a trust in this case, the question arises, whether the court, by virtue of its common law powers, and without the aid of the statute of 43d Elizabeth, has the power to enforce the trust. The general jurisdiction of chancery over trusts has never been questioned, and the interposition and direction of courts of equity as to trusts created by will, are very frequently afforded for the safety of parties in interest, and to protect them against further litigation.—2 Story's Eq. 325.

I think it clear, that according to the English authorities, these bequests would be sustained independently of the statute of Elizabeth. Such is the opinion of Judge Story, as expressed in the case of Vidal et al. v. Girard's Ex'rs., (2 How. 128.) After an elaborate examination of the English authorities, and showing that the dicta and opinions in a large majority of the cases go to sustain such bequests, he says: "There is the very recent case of the Incorporated Society v. Richards, (1 Drury & Warren R. 258,) where Lord Chancellor Sugden, in a very masterly opinion, upon a full survey of all the authorities, and where the point was directly before him, held the same doctrine as Lord Redesdale, and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of the objects for which a court of equity has at all times interfered, to make good that which, at law, was an illegal or informal gift; and that cases of charity in courts of equity in England were valid, independently of, and previous to, the statute of Elizabeth. Justice Baldwin, in the case of the will of Sarah Zane, after very extensive and learned researches into the English authorities and statutes, arrived at the same conclusion." Judge Story further adds, in the foregoing case of Vidal et al., &c., "that very strong additional light has been thrown upon this subject by the recent publications of the Commissioners on the Public Records in England, &c. Among these are found many cases in which the Court of Chancery en-

tertained jurisdiction over charities long before the statute of 43d Elizabeth, and some fifty of those cases have been laid before us. They establish in the most satisfactory manner, that cases of charity, where there were trustees appointed for general and indefinite charities, as well as for specific, were familiarly known to, and acted upon and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain nature, but as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees, or the trustees were incompetent to take. The Records, therefore, do, in a remarkable manner, confirm the opinions of Sir Joseph Jekyll, Lord Northington, C. J. Willmot, Lord Redesdale and Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject, when the case of the Philadelphia Baptist Association v. Hart's Ex'rs. (4 Wheat. 1,) was before this court, those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."

There seems to be greater contrariety among the American than the English decisions on this subject, but I think the weight of American authority is decidedly in favor of such bequests.

In Massachusetts, in the case of Burbank v. Whitney, (24 Pick. 146,) the bequest was to the American Bible Society, and to the American Home Missionary Societies, unincorporated societies. The court say, there is no doubt that donations to charitable purposes were held valid previous to the statute Elizabeth, and that they were good, although the charity was to be distributed by an unincorporated society, and although no person was *in esse* who could be the *cestui que use*, and whether such society transacts its business here or in another State.

In Kentucky, in Moore's Heirs v. Moore's Devisees and Ex., (4 Dana, 354,) it was held that the devise, viz: "that the testator's estate in a certain contingency that did happen, should be converted into a fund for the education of some poor orphans (of this county) to be selected by the County Court, is a valid devise at common law, and may be enforced independently of any English statute."

In North Carolina, (1 Hawks' L. & E. R. 97, Griffin v. Graham,) the object of the bequest was the establishment of a school for the education and maintenance of poor orphan chil-

dren, and it was sustained. In these three States the statute of Elizabeth was held to be substantially in force, but that the bequests were good independent of the statute.

In New York, in Potter v. Chapin, (6 Paige 649,) the chancellor says, "although some doubt was thrown upon the question of charitable donations, for the benefit of a community or body not incorporated, so as to be capable of taking and conveying the legal title to property, by the decision of the Supreme Court of the United States in the case of the Baptist Association v. Hart's Ex'r., (4 Wheat. 1,) I believe that it is generally admitted that the decision in that case was wrong. And it may be considered as an established principle of American law, that the court of chancery will sustain and protect such a gift, bequest, or dedication of property to public or charitable uses, where the object of the gift is specific, and capable of being carried into effect, according to the intention of the donor."

In King v. Woodhall, (3 Edwards 79,) the bequest was to the Home Missionary Society, an unincorporated voluntary association, where neither the object of the bequest was specified, nor any purpose to which the money was to be applied, yet the bequest was sustained. The vice chancellor says, "the testator must be presumed to know the purposes for which the society was formed, and to what objects and uses its funds were to be applied." In Wright et al. v. Trustees of Methodist Episcopal Church, (1 Hoffman 205,) the bequest was "to the Yearly Meeting of Friends in New York, a voluntary unincorporated association." The bill was filed to obtain the directions of the court as to the distribution of the estate. It was held that the power to enforce such a charity was in the court, by virtue of its original constitution, independent of the statute, and the bequest held to be valid. The decision of McCartee v. Orphan Asylum, (9 Cowen 437,) is to the same effect.

In Pennsylvania, in Witman v. Lex, (17 Serg. & Rawles 93,) a bequest to St. Michael's & Zion's Churches, to be laid out in bread annually for ten years for the poor of the Lutheran Congregation, and also a bequest for the education of young students in the ministry of the German Lutheran Congregation, were sustained; and the Chief Justice adds, "it is immaterial whether the person to take be *in esse* or not, or whether the legatee were, at the time of the bequest, a corporation capable

of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested any where over the application of the testator's bounty to those objects."

In 7 Vermont Reports, 241, (Executors of Burr v. Smith et al.,) the bequest was to the treasurer, for the time being, of the American Bible Society, an unincorporated society. The bequest was sustained, and it was decided that courts of chancery held jurisdiction over charitable bequests before the statute of Elizabeth, by virtue of their equity jurisdiction, and that a gift to a charitable use might be decreed, notwithstanding the objects were vague and indefinite, and the persons who were to carry into effect the intent of the testator, were a society unincorporated.

In the three last mentioned States the statute of Elizabeth was not in force.

The leading case in opposition to the foregoing decisions, is the the case already referred to in 4 Wheat. 1. The bequest was "to the Baptist Association that for ordinary meets at Philadelphia annually, to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising, for the ministry, always giving preference to the descendants of the testator's father's family." It was held that the association, being an unincorporated society, could not take the trust, and that the bequest was void for uncertainty as to the devisees, and could not be established by a court of equity without the aid of the statute of Elizabeth, which was not in force in Virginia, where the case arose. This case was followed by the decisions (and the decisions placed upon the same ground) in Gallego's Ex'rs. v. The Attorney General, (3 Leigh 450,) decided in Virginia, and in Dashiell v. Attorney General, (5 Har. & John. 392,) decided in Maryland. In Tennessee, in Greene et al. v. Allen et al., (5 Humph. 170,) a similar doctrine is held, and that a devise analogous to the one under consideration could not be sustained under the statute of Elizabeth. In this construction of the statute this decision differs from all the authorities I have examined.

I consider the above case from 4 Wheat. as partially, if not altogether overruled by the same court. In Beaty v. Kurtz, (2 Peters 566,) a lot of ground had been marked out by the proprietor, upon the original plan of the town, for the use of the Lu-

theran Church, a voluntary unincorporated society. This was sustained in favor of the society upon a bill filed by a committee in behalf of the society. In Ingles v. The Trustees of the Sailor's Snug Harbor, (3 Peters 99,) the testator gave real estate to the chancellor, &c., and other persons by their official description and their successors in office, to establish an asylum called the "Sailor's Snug Harbor," for the purpose of maintaining aged and decrepid sailors. The devisees, as requested by the testator, were incorporated after his death. The court sustained the devise in opposition, as I think, to the case from 4 Wheat. 1. The object of the bequest, the maintaining aged and decrepid seamen, is quite as vague as the object in that case, nor were the devisees more competent to take than the members of the Baptist Association.

In the case in 2 Howard 128, (Vidal et al. v. Girard's Ex'rs.) one of the objections to the will was, that the beneficiaries were too uncertain and indefinite. They are declared in the will to be "poor white male orphans, between the ages of six and ten years," first, of the city of Philadelphia; secondly, those born in any part of Pennsylvania; thirdly, of the city of New York, and lastly, those of New Orleans. See the opinion of Judge Story, above referred to, in which the case in 4 Wheat. 1 is reviewed, and this is held to be a valid charity, independent of the statute of Elizabeth.

With the view I take of this case, it is not necessary to inquire whether the statute of 43d Elizabeth is in force in this State. It appears that that statute was passed in the year 1601, and the first settlement of Virginia, (that being the first settlement in any part of the United States,) was in 1607. And the doctrine appears to be settled that English statutes passed before the emigration of our ancestors to America, and which were applicable to our situation and not inconsistent with our institutions and government, constitute a part of the common law, and are in force (unless repealed) in all the States of the Union.—5 Pet. 233; 8 Pick. 309; 4 Paige 198; 1 Kent. 472-3; 4 Dana, 361.

In the case above referred to in 4 Wheat. 29, Chief Justice Marshall admits that the legacy in that case would be sustained in England under the statute of Elizabeth, and the decisions, so far as I have examined them, are uniformly to that effect, except the case above referred to in Tennessee.

My opinion is, that the bequests in the will are valid, and that a court of equity can give them effect by virtue of its common law and judicial powers, without claim to any *prerogative* power, and without invoking the aid of the statute of 43d Elizabeth. I do not recognize the doctrine of "cypres," which, in substance is, if you cannot find the society specified in the will, or apply the fund to the charity intended by the testator, the court will then apply it to some other charity as nearly analogous to it as possible. The bequests should be paid only to the societies specified in the will, or their authorized agents. If the societies or either of them did not exist at the time of the testator's death, or cannot now be found, organized and known as above stated, then the bequest to such society or societies should be considered and disposed of as lapsed legacies. The meaning of the chancellor is somewhat obscure on this last point, but we think if the decree is rea onably construed, it will be found to conform substantially with the foregoing view of the case.

We see no error (as is insisted by part of the plaintiffs in error,) in the mode of marshalling the assets of the estate adopted by the decree. John O. Balfour, by his will, after giving the legacies to his sister Emily, &c., in legal effect gave the whole of his estate to his wife, subject to the charge of the charities. She bequeathed specifically to the legatees named in her will all the personal estate, leaving the real estate undisposed of, and which was consequently properly decreed first to be appropriated to the payment of the charities. The whole of the estate, real and personal, was charged with the payment of the charities, but Regina Balfour had clearly the right to determine what part of the estate should be first applied towards the payment thereof.

The decree is affirmed.

CHILTON, J., having been of counsel, did not sit in this case.

CURRY & GROCE *vs.* SHRADER & WIFE.

1. To charge the husband, under the act of 1846, with the debts of his wife contracted *dum sola*, it must be shown that he has received property in right of his wife before the commencement of the suit; and a recovery can only be had against him to the amount of the property so received before the commencement of the suit.
2. What is the creditor's remedy to obtain a judicial recognition of his debt contracted by the wife *dum sola*, when the husband has not received any property in right of his wife—QUERE?

ERROR to the Circuit Court of Shelby. Tried before the Hon. Geo. D. Shortridge.

WHITE & PARSONS, for plaintiffs in error.

WOODWARD, *contra*.

DARGAN, C. J.—This suit is against husband and wife, upon a note made by the wife whilst *sole*. Upon the trial, it appeared that some time after the suit was commenced, the husband had received in right of his wife money and notes to an amount greater than the debt sued for, but at the commencement of the suit had received nothing. At common law the husband became liable for the debts of the wife, contracted before the marriage, whether she brought to him property or not. The marriage alone bound the husband, during the coverture, to the payment of her debts. But by an act of our Legislature passed in the year 1846, it is provided, "That the property of the wife at the time of the marriage, or which she may receive by descent, bequest or gift, shall not be subject to the debts or liabilities of the husband contracted or incurred before the marriage; nor shall the husband be liable to pay the ante-nuptial contracts or liabilities of the wife, further than the property received by the wife; but such property received by the wife, shall be liable to her debts, notwithstanding the termination of the coverture." See Pamph. Acts of 1845-6, p. 24, § 6.

Under the influence of this statute, it is clear that to charge the husband with the debts of the wife, contracted before the marriage, it must appear that he has received property or effects in right of his wife sufficient to pay them; and he cannot be charged with the debts of his wife contracted *dum sola*, beyond

the value of the property he has received by her. As it is his receipt of property in right of his wife that renders the husband liable for the ante-nuptial debts of the wife, it follows that no cause of action accrues against him until he has received property by, or in the right of his wife; for it is the receipt of property by virtue of the marriage, and not the marriage itself, that fixes the husband's liability. The writ in this case was sued out and served upon the husband before he had received any property or effects in right of his wife, and consequently as to him was commenced before the cause of action accrued. Had this defect been apparent upon the record, the husband could have demurred, moved in arrest of judgment or reversed it on error.—Waring v. Yates, 10 Johns. 124; Cheetham v. Lewis, 3 Johns. 42; Roud v. Griffith, 11 S. & R. 130. But as it was brought to light for the first time by the evidence, it could only be taken advantage of upon the trial.—Hogan v. Cuyler, 8 Cow. 203. Indeed, it is perfectly clear, that a suit cannot be sustained by proof showing that the plaintiff has acquired a cause of action against the defendant since the commencement of the suit against him. The Circuit Court, therefore, erred in charging the jury that the plaintiffs were entitled to recover, if they believed from the evidence that the husband had received property by his wife, *before or after* the commencement of the suit, equal in value to the debt sued for.

But it is contended that the marriage does not extinguish the liability of the wife, and there is no mode of obtaining a judgment at law against her, except it be jointly against her and husband. We see the difficulty arising out of the statute, presented by this view, and feel the necessity of adopting some mode, or of laying down some rule, by which a creditor may obtain a judicial recognition of a debt against a married woman, when the husband is not liable for its payment. But it is not and will not be necessary in this case to decide the question, or prescribe the remedy that must be adopted in such cases. It may, however, be observed, that the remedy must be either against her alone at law, or a bill in equity must be filed, on the ground that there is a legal right, but no legal remedy to enforce it. The latter course, in my judgment, is the proper remedy; but as it is not necessary to decide the point, the court prefers that it should remain an open question, until it becomes indispensably necessary to decide it.

Let the judgment be reversed and the cause remanded.

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ABATEMENT.

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3. If two or more persons are bound jointly, but not severally, and one is sued alone, he can only take advantage of the non-joinder of the others by plea in abatement, and cannot insist on the omission under the general issue.—*Henderson* v. *Hammond*, 340
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ACCOUNT.

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and will render him liable on a similar account subsequently contracted.—*McKenzie* v. *Stevens*, 691

ADMIRALTY.

1. The act of 1836, (Clay's Dig. 139, § 22,) which required that all liens upon steam-boats and other water crafts for materials, labor or stores furnished them, should be enforced *on or before the first day of July then next ensuing*, is repealed by the act of 1848. (Pamphlet Acts, 146,) which requires such liens to be enforced *within six months from the time of their creation*.—*Stewart George* v. *Skeates & Co.* 738
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3. Whether the claimant can raise the objection that the boat was not in the possession of the sheriff, nor within the control of the court, after joining issue upon the merits of the libel without an exceptive allegation to the jurisdiction of the court—QUERE? *Ib.*
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AGENCY.

1. If an agent, having parol authority to fill up a blank to which his principal has simply signed his name, converts the blank into a sealed instrument, his principal is not bound by it.—*Arrington* v. *Burton*, 114
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3. When authority is given to an agent to do a particular act, and the manner of executing that authority is not prescribed, the principal is bound by the act of the agent, although it may not be done in the manner in which he desired it to be done, or in which he would himself have done it. *Ib.*
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AGENCY--CONTINUED.

him, and will render him liable on a similar account subsequently contracted.—*McKenzie* v. *Stevens*, 691

6. When the authority of the son to bind his father for goods furnished is once shown to exist, the lapse of fifteen months will not overcome the presumption of the continuance of that authority, so as to discharge the father from liability for goods subsequently furnished, it being shown that during all that time the son was absent from the place where the two accounts were contracted. *Ib.*

7. The authority of the son to bind his father by the purchase of goods being established, the declarations of the son respecting the subject matter are also admissible evidence against the father, if made at the time of the purchase and constituting a part of the *res gestæ*. *Ib.*

8. In assumpsit against the defendant for goods furnished to his minor son, the facts being proved from which the law will presume the son's authority to bind his father by such contracts, and no proof being offered to rebut this presumption, it is not error for the court to charge the jury that if they believe the evidence they must find for the plaintiff. *Ib.*

ALIMONY.

1. When a divorce *a vinculo matrimonii* is decreed in favor of the wife, it is error to decree alimony to her, instead of a division of the estate between the parties, (Clay's Dig. 170, § 8.)—*Quarles* v. *Quarles*, 363

AMENDMENTS.

1. When an amendment to a bill is properly allowed, the appellate court will not review the decision of the chancellor in allowing the amendment without terms.—*McLane & Plowman* v. *Riddle & Burt*, 181

2. A record can only be amended by some matter of record.—*Metcalf* v. *Metcalf*, 319

3. A memorandum in the hand writing of a Judge of Probate on the trial docket of his court, in the following words, viz: "J. M. heir of A. M. v. Administrators; Ordered to appoint Auditors, (naming them;) Ordered that they report *instanter;* Auditors report in administrator's hands, $469 82,"—is insufficient to authorize the court to render a decree *nunc pro tunc* at a subsequent term, against the administrators in favor of J. M. for the amount thus ascertained. *Ib.*

4. It is not error to permit the plaintiff to amend the endorsement on his writ, so that he may add special counts to his declaration.—*Moore* v. *Smith*, 774

5. If an entire record, or a part thereof, is lost or destroyed, another may be substituted in its stead upon proof of the contents of that which is lost.—*Bishop's Heirs* v. *Hampton*, 792

6. But the substitute must be consistent with that part remaining on file, and must not alter or vary its legal effect as evidence. *Ib.*

APPEALS FROM JUSTICES.

1. When an appeal is taken to the Circuit Court from the judgment of a Justice of the Peace, by which a party is required to find sure-

APPEALS FROM JUSTICES—CONTINUED.

ties to keep the peace, the Circuit Court is required to proceed with the examination *de novo*, and may therefore refuse to look to the legal sufficiency of the warrant under which the party was arrested.—*Tomlin et als.* v. *The State*, 9

2. The Circuit Court may render judgment for costs on the appeal bond, against the securities of a party who has appealed from the order of a Justice of the Peace, requiring him to find sureties to keep the peace. *Ib.*

3. A writ of error does not lie to revise the action of the Circuit Court in cases of appeal from the order of a Justice of the Peace, or other officer, requiring a party to find sureties to keep the peace. *Ib.*

4. When the defendant against whom a judgment has been rendered by a Justice of the Peace, removes the cause by *certiorari* into the County Court, a judgment of *non pros*, cannot be rendered against the plaintiff, unless he has been notified of the issuance of the *certiorari*.—*Crownover* v. *Srygley*, 251

5. *It seems*, however, that cases removed from Justices' Courts by *certiorari*, are not embraced in the statute, (Clay's Dig. 315, § 17,) which secures to the appellee a right to notice of an appeal from the judgment of a Justice of the Peace. *Ib.*

6. On an appeal from a judgment rendered by a Justice of the Peace, a statement of the cause of action which does not set forth the amount sued for is defective.—*Jones* v. *Buckley*, 604

7. It is erroneous to dismiss an appeal from a Justice of the Peace to the Circuit Court, on account of a defect in the appeal bond, when the appellant offers to execute a new and sufficient bond and proceed to trial forthwith.—*Appleton* v. *Turrentine*, 706

8. When a party against whom a judgment is rendered by a Justice of the Peace, craves an appeal from the judgment on the day of its rendition, but does not give bond until the sixth day afterwards, being prevented from giving bond on the fifth day by reason of the Justice's absence from home, it is error to dismiss the appeal.—*Averett* v. *Horn*, 803

APPELLATE COURT.

1. When the record contains no bill of exceptions, but only an agreement purporting to have been made between the Solicitor and the counsel for the defendant, that the bill of exceptions taken in another case should be regarded as having been taken in the case at bar, and the minute entry does not show that the agreement was acknowledged by the parties in the Circuit Court, or made part of the record by an order of that court, the appellate court will reject the agreement.—*Cobb* v. *The State*, 18

2. When the judgment entry shows, that the plaintiff demurred to the defendant's pleas, and that the demurrer was overruled, and the demurrer also appears upon the record, this court will not look to the order in which the clerk has recorded the pleadings, and determine that the demurrer was waived, because issues of fact precede it.—*Kirksey, trustee, &c.* v. *Dubose*, 43

APPELLATE COURT--CONTINUED.

3. The appellate court will not reverse on account of an error, when the record clearly shows that no injury resulted from it to the plaintiff in error.

(CHILTON, J., dissenting. held that the appellate court should reverse in favor of a party, against whom the court below has improperly overruled a demurrer to the declaration, although it may appear from the evidence set out in the record, that the plaintiff was entitled to recover under counts which are unobjectionable.)—*Smith & Garey* v. *Awbrey*, 63

4. The appellate court will not reverse a decree of the Probate Court, on account of the misdirections of the judge to the jury, upon the trial of an issue of fact, in cases where the awarding of such issue is a matter of discretion in the court, when the verdict is in conformity with the evidence, and the final decree, based upon the verdict, is the same that it should have been without it.—*Milam, adm'r*, v. *Ragland*, 85

5. When an amendment to a bill is properly allowed, the appellate court will not review the decision of the chancellor in allowing the amendment without terms.—*McLane & Plowman* v. *Riddle & Burt*, 181

6. When a writ is returned into court, executed by the proper officer, although it was not executed five days before the sitting of the court, yet if the defendant makes no objection to its execution in the primary court, he cannot raise the objection in the appellate court.—*Moore* v. *Fiquet*, 236

7. When the entire record affirmatively shows, that the plaintiff below can never recover, and the matter which renders a recovery impracticable is obvious and undisputed, the appellate court will not reverse in his favor, on account of errors in the charges of the court below.—*Gilmer* v. *Ware*, 252

8. When a declaration contains a special count and also the common counts, and the evidence, though inapplicable to the common counts, clearly entitles the plaintiff to a recovery on the special count, the appellate court will not reverse on account of the court below instructing the jury that he was entitled to recover on the common counts.—*Herndon* v. *Givens' Adm'r*, 313

9. The appellate court will not notice any errors except such as are assigned upon the record; and the practice is to examine such of them only as are insisted on by counsel.—*Long* v. *Rodgers*, 321

10. Although the charge given by the court is not in the language in which it is requested, yet if it be a full and fair exposition of the law, and not calculated to mislead the jury, the judgment will not be reversed.

(CHILTON, J., dissenting, held, that if the charge requested asserts a correct legal proposition in appropriate terms, and is applicable to the proof, it should be given in the language of the request.)—*Ib.* 322

11. An objection to the formation of the grand jury cannot be raised for the first time in the appellate court.—*Morgan* v. *The State*, 557

12. A prisoner charged with a capital offence, after having been refused

APPELLATE COURT--CONTINUED.

bail by a Circuit Judge, on application by *habeas corpus*, may petition the Supreme Court for a revision of the decision of the Circuit Judge. *Ex parte Croom & May*, 561

13. The proper practice in such case is, for the prisoner to petition the Supreme Court for the writ of *habeas corpus* and such other remedial process as may be necessary to render its control effectual, setting forth under oath such a state of case as will show that the Circuit Judge erred to his prejudice, and that he was entitled by the case then made to the relief which he seeks. *Ib.*

14. If the Supreme Court deems the showing *prima facie* sufficient to entitle the prisoner to bail, the writs of *habeas corpus* and *certiorari* will be awarded, to bring before the Supreme Court the body of the prisoner and the proceedings had before the Circuit Judge, that if, upon a full hearing on the return of the writs, the prisoner should be adjudged entitled to bail, he may be allowed to give bail in such sum as may be prescribed.—*Ib.* 562

15. Instead of the writs of *certiorari* and *habeas corpus* issuing from the Supreme Court, an agreed statement of the facts and proceedings had before the Circuit Judge may be submitted by the counsel for and against the prisoner, and if the Supreme Court decides that the prisoner is entitled to bail, application may again be made to the Circuit Judge. *Ib.*

ASSIGNMENTS.

1. An assignment of accounts to be created in future vests an equitable interest in the assignee, which will be protected in a court of law, when sued upon in the name of the assignor for the use of the assignee, but not as against a debtor who without notice of the assignment has acquired a legal set-off.—*Stewart* v. *Kirkland*, 162

2. When accounts to be created in future are conveyed by deed of trust, together with certain other personal property, the registration of the deed is not *constructive* notice of the assignment of the accounts. To prevent a set-off against them, the defendant must be charged with *actual* notice of their assignment. *Ib.*

3. When the assignor of a note and his assignee join in a bill, the admissions of the assignor before the commencement of the suit are sufficient evidence of the assignment.—(Overruling Moore et al. v. Hubbard, 4 Ala. 187.)---*McLane & Plowman* v. *Riddle & Burt*, 180

4. The title of the assignee of a note, in a bill filed jointly with his assignor, is sufficiently established by proof that the note was assigned *in liquidation of a debt* due to him from his assignor, although the bill alleges that it was assigned *as collateral security*. *Ib.*

ASSUMPSIT.

1. An administrator who has paid money through mistake, to the administrator *de bonis non* who succeeds him, cannot recover it in assumpsit from a successive administrator *de bonis non*.---*Weeks* v. *Love, admr*, 25

2. When a party has entered into a special contract to do certain work, or perform a specified service, and the work is done, but not accord-

ASSUMPSIT—CONTINUED.

ing to the terms of the contract, yet if it is accepted by the party for whom it was to be performed, and is beneficial to him, the party performing it may recover on a *quantum meruit*, the value of the work done, or service rendered.—*Hawkins* v. *Gilbert & Maddox*, 54

3. But if, after having commenced the work, he abandons it before it is finished, without sufficient cause, he cannot recover for the work and labor done.—*Ib.* 55

4. In assumpsit on a promissory note purporting to be given for professional services to be rendered in future by the payees as attorneys at law, but payable at a day certain, parol proof is inadmissible to show that it was the agreement of the parties, that the note should not be paid unless the payees were successful in the suit for the bringing of which it was given.—*West & West* v. *Kelly's Ex'rs*, 353

5. When the plaintiff sues for the work and labor of her minor son, she must aver in the statement of her cause of action, that the father of the minor is dead, or that she is entitled to the minor's services, as guardian or otherwise.—*Jones* v. *Buckley*, 604

6. When a father pays without objection an account contracted by his minor son while attending school at a distance from home, the payment is equivalent to a recognition of the son's authority to bind him, and will render him liable on a similar account subsequently contracted.—*McKenzie* v. *Stevens*, 691

7. When the authority of the son to bind his father for goods furnished is once shown to exist, the lapse of fifteen months will not overcome the presumption of the continuance of that authority, so as to discharge the father from liability for goods subsequently furnished, it being shown that during all that time the son was absent from the place where the two accounts were contracted. *Ib.*

8. The authority of the son to bind his father by the purchase of goods being established, the declarations of the son respecting the subject matter are also admissible evidence against the father, if made at the time of the purchase and constituting a part of the *res gestæ*. *Ib.*

9. It is not error to permit the plaintiff to amend the endorsement on his writ, so that he may add special counts to his declaration.—*Moore* v. *Smith*, 774

10. A count in assumpset set forth, "That in consideration that the said plaintiff would furnish three hands, and feed and clothe said servants for the year 1844, and pay all of their expenses, and work the same on the plantation of said defendant in Perry County, Ala., and furnish provisions for himself and his family and said three hands, the hands and mules and horses of said defendant in the capacity of an overseer, he the said defendant agreed and promised to place on said plantation his hands, to-wit, the hands owned by him, and live on said farm, and his mules and horses and to furnish the said hands &c., placed by him on said plantation with provisions and said hands with clothing, to pay all expenses of the said hands and mules, so furnished as aforesaid by said plaintiff and said defendant, and raise a crop thereon in said year 1844, for which said defendant

ASSUMPSIT—CONTINUED.

agreed and promised that said defendant should have and draw a part of the crop raised on said farm by said defendant with the said hands, mules and horses in the year 1844, in proportion to the said hands of plaintiff so placed on said farm," &c., and averred that the plaintiff performed the contract on his part, in all things, and raised a crop on said plantation, "of which his reasonable share was one third thereof," &c. *It was held*,

That the count was demurrable, the contract as set out being too vague, indefinite and uncertain to support an action. *Ib.*

ATTACHMENTS.

1. If an attachment be issued without the bond and affidavit required by the statute, it can only be abated on the plea of the defendant.—*Kirkman & Rosser* v. *Patton*. 32
2. Until abated, it is valid, and its levy on the property of the defendant creates a lien, which cannot be displaced, or held for nought, merely by showing such irregularities in the process, as would have entitled the defendant in the writ to abate it on plea. *Ib.*
3. If the writs of attachment, under which the sheriff justifies, are regular on their face, he is not bound to go beyond them, and show affidavits and bonds, or that there was a subsisting debt, on which they might properly issue.—*Kirksey, Trustee, &c.* v. *Dubose*. 44
4. An issue tendered by the plaintiff in an attachment suit, contesting the answer of a garnishee, which avers "that the said garnishee is indebted to the said defendant in attachment, and was at the time of the service of the garnishment," is sufficient.—*Harrell* v. *Whitman*. 135
5. The plaintiff in attachment can only subject, by process of garnishment, such debts as the defendant might recover by suit at law in his own name. *Ib.*
6. When a garnishee comes into a court of chancery to be relieved against a judgment at law, which has been rendered against him by default, he should show by his bill, not only that he is not indebted to the defendant in attachment, but also that he has no effects in his hands belonging to said defendant.—*Hair & Labuzan* v. *Lowe*. 224
7. When a judgment has been rendered by default against a garnishee, and the evidence clearly shows that the failure to defend at law is attributable to his own neglect, he cannot be relieved in equity against the judgment. *Ib.*
8. In an action for maliciously suing out an attachment, evidence that another attachment against the plaintiff was in the hands of the sheriff and was levied on the same property at the same time that the defendant's was levied, is inadmissible for the defendant.—*Yarbrough* v. *Hudson*. 653
9. But the defendant may prove the issuance of another attachment and *notice thereof to himself* previous to the issuance of his own attachment, as tending to rebut the presumption of malice. *Ib.*
10. A deed of trust executed by the plaintiff prior to the issuance of the attachment is admissible evidence for the defendant in such an ac-

ATTACHMENTS—CONTINUED.

tion; and also any proof tending to show that it was fraudulent; or that it was part of a plan to enable the plaintiff to dispose of his property fraudulently; or that he was in embarrassed circumstances at the time of its execution; or that the property conveyed by it was subsequently run off by the beneficiary to another State. *Ib.*

11. Previous to the Act of 1850, (Pamphlet Acts, 45,) an attachment could not be sued out on account of a fraudulent disposition of his property by the defendant, consummated prior to the issuance of the attachment. *Ib.*

12. When the parties proceed to trial upon an issue whether "the brig levied on was, at the date of the levy, subject to the attachment," a bill of sale bearing date after the levy is *prima facie* irrelevant, as being outside of the issue.—*Fontaine & Dent* v. *Beers & Smith*, 722

13. But such an issue is itself immaterial. *Ib.*

BAIL.

1. A prisoner charged with a capital offence, after having been refused bail by a Circuit Judge, on application by *habeas corpus*, may petition the Supreme Court for a revision of the decision of the Circuit Judge. *Ex parte Croom & May*, 561

2. The proper practice in such case is, for the prisoner to petition the Supreme Court for the writ of *habeas corpus* and such other remedial process as may be necessary to render its control effectual, setting forth under oath such a state of case as will show that the Circuit Judge erred to his prejudice, and that he was entitled by the case then made to the relief which he seeks. *Ib.*

3. If the Supreme Court deems the showing *prima facie* sufficient to entitle the prisoner to bail, the writs of *habeas corpus* and *certiorari* will be awarded, to bring before the Supreme Court the body of the prisoner and the proceedings had before the Circuit Judge, that if, upon a full hearing on the return of the writs, the prisoner should be adjudged entitled to bail, he may be allowed to give bail in such sum as may be prescribed.—*Ib.* 562

4. Instead of the writs of *certiorari* and *habeas corpus* issuing from the Supreme Court, an agreed statement of the facts and proceedings had before the Circuit Judge may be submitted by the counsel for and against the prisoner, and if the Supreme Court decides that the prisoner is entitled to bail, application may again be made to the Circuit Judge. *Ib.*

5. The fortieth section of the eighth chapter of the Penal Code, [Clay's Digest, 444,] by which it is enacted that if the defendant in capital cases is not tried at the first term at which he is properly triable, on account of any of the causes therein specified, he shall not be entitled to bail as a matter of right, *but that he may claim to be discharged on bail if he is not tried at the second term*, unless the failure is occasioned by his own fault or misfortune, or on his application, or with his assent, is not repugnant to the seventeenth section of the first article of the constitution, by which it is declared, that "all persons, before

BAIL—CONTINUED.

conviction, shall be bailable by sufficient securities, *except for capital offences, where the proof is evident, and the presumption great.*" *Ib.*

6. The word "term." as used in the fortieth section of the eighth chapter of the Penal Code, [Clay's Digest, 444,] means *the period of time prescribed by law during which the court is required to be held*, unless the business is sooner disposed of, *and not the time during which the court may actually be in session.* *Ib.*

7. A prisoner charged with a capital offence, who makes application to be discharged on bail, on account of an unauthorized premature adjournment of the court at the first term at which he was properly triable, without any disposition having been made of his case, makes out a *prima facie* case for relief, by showing that he was arrested and in the custody of the sheriff before the adjournment of court, that the judge adjourned the court, *sine die*, before the expiration of the period allowed by law for holding it, and while there was business on the docket undisposed of, that no disposition was made of his own case, that no cause for the adjournment was assigned in the order, and that none appears in the record. When no cause for the premature adjournment is assigned on the record, the appellate court will not presume that a sufficient cause existed, nor will it require the prisoner to prove that a sufficient cause did not exist. *Ib.*

8. A prisoner in such case may insist on his right to be discharged on bail on account of such premature unauthorized adjournment, although at the time of the adjournment he was confined in the custody of the sheriff, at a place several miles distant from the court-house, and the sheriff was advised by physicians that it was unsafe to remove him on account of his wounds, and although he made no application for a trial, and might have continued his trial on account of his situation. *Ib.*

9. A general order of continuance of causes not otherwise disposed of, if made at the suggestion, or with the consent of the parties, or their counsel, would operate as a continuance entered in each case by consent, and would be a completion of the business of the court justifying its adjournment. *Ib.*

10. When a prisoner is committed for an assault with intent to kill and murder, and it is shown that the person wounded is in danger of dying before the expiration of a year and a day from the time the wound was inflicted, the prisoner is not entitled to bail, as a matter of right, because no indictment has been found against him although two terms of the court at which he might have been indicted have elapsed since his commitment, unless it is also shown that he would be entitled to bail if death should ensue within the year and day.—*Ex parte Andrews & Wife*, 582

BANK AND BRANCHES, STATE.

1. The courts in this State are bound to take judicial notice that the assets of the State Bank and Branches are placed in the hands of commissioners who are authorized to sell or lease its real estate, and to

BANK AND BRANCHES, STATE—CONTINUED.

appoint assistant commissioners to aid in the adjustment and settlement of its affairs.—*Douglas & Easton* v. *The Branch Bank at Mobile*, 659

2. When a lease of real estate belonging to the Bank is executed in the name of the assistant commissioner, and the rent due thereby is to be paid to the Bank, equity will decree a reformation of the contract and a specific performance against the Bank. *Ib.*

3. The Bank may sue in its own name on a lease of its real estate, when by the terms of the lease the rent is reserved to it, although the demise is in the name of the assistant commissioner. *Ib.*

BANKRUPT.

See Chancery, 16.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. If the owner of a promissory note give it up to one of the makers, with the understanding that another note is to be executed in its stead, this will not discharge either one of the makers.—*Smith & Garey* v. *Awbrey*, 63

2. When a person places a note in the hands of an attorney for collection, and takes from him a receipt for it in his own name, but does not claim it as his own, nor any lien upon it, and the note itself is payable to a third person, and not endorsed, a payment by the attorney of the proceeds of the note to the payee will discharge him from all liability to the person who placed the note in his hands. —*Peck & Clark* v *Wallace & Lewis*, 219

3. When suit is brought on a promissory note, in the name of the payee for the use of the assignee against the maker, the latter cannot defend himself by showing that before the assignment of the note sued on, he was surety for the payee on a note to the bank, that the payee became and continued to be insolvent, and that afterwards, on account of the payee's insolvency, he had been compelled to pay the bank debt, unless he also shows that such payment was made before the transfer of the note sued on, and notice thereof.—*Gildersleeve* v. *Caraway, use, &c.*, 246

4. In assumpsit on a promissory note purporting to be given for professional services to be rendered in future by the payees as attorneys at law, but payable at a day certain, parol proof is inadmissible to show that it was the agreement of the parties, that the note should not be paid unless the payees were successful in the suit for the bringing of which it was given.—*West & West* v. *Kelly's Ex'rs*, 353

5. The wife's separate estate is bound for the payment of a promissory note executed by her for goods, wares and merchandize furnished to her and her family.—*Collins et als.* v. *Lavenberg & Co.*, 682

6. An endorser who is fully indemnified, or one for whose accommodation the note was drawn and who has received the benefit of it, is not entitled to notice of its non-payment.—*Holman* v. *Whiting*, 703

7. A bill of exchange drawn by "*Ebenezer Hearn*" may be given in ev-

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

idence under a declaration on a bill alleged to have been drawn by "*Ebenezer Hearne.*"—*Coster, Robinson & Co.* v. *Thomason, use, &c*, 717

8. A statement by a witness "that the habits of business and intimacy between himself and the defendant were such that witness had no doubt if said defendant had received notice of protest of said bill, it would at once have been communicated to witness," is inadmissible evidence for the defendant in a suit on the bill, being a mere expression of opinion, and not the statement of a fact within the knowledge of the witness. *Ib.*

9. When a bill endorsed by a partnership is dishonored after a dissolution of the firm, notice of protest to any one of the late partners is sufficient to bind all. *Ib.*

10. A recital in the notary's certificate of protest, that "notice of the protest had been left at the offices of the endorsers," is not, of itself, sufficient to charge an endorser with notice. *Ib.*

BONDS AND COVENANTS.

1. When no time is limited for the performance of a covenant, it must be done *within a reasonable time.* Therefore, when the obligors in a bond for title bound themselves to make title to the obligee, which the bond showed was in a third person, and the obligee lived more than three years after the execution of the bond, during which time the obligors did not enable themselves to comply with the condition of their bond, and made no effort to procure the title, it is *prima facie* a breach of the condition of the bond in the life-time of the obligee, for which his administrator is the proper party to bring suit.—*Allen, Adm'r.* v *Greene,* 34

2. When the bond shows that the title is in a third person, and the obligor never procures a conveyance of the title to the obligee, nor obtains it himself, the heir of the obligee cannot take the land by descent, nor sue in his own name for a breach of the condition, whether that breach happened before or after the death of his ancestor. *Ib.*

3. If the obligee has not violated the contract on his part, an action may be maintained by his administrator, for a breach, although the purchase money may not have been paid. *Ib.*

4. But if the obligee is notified by the surety of the principal obligor, that the title is not in the person named in the condition of the bond, and promises such surety, on his request, not to pay the purchase money until the title is arranged, but afterwards, in violation of his promise, pays it, when he could, consistently with his contract, have retained it, the surety, in a suit on the bond, can reduce the damages to the extent of the purchase money. *Ib.*

5. When the official bond of a county treasurer is defective as a statutory bond, but good as a common law bond, suit can only be brought upon it in the name of the obligee.—*Wilson, use, &c.* v. *Cantrell et als.*, 642

6. An official bond of a county treasurer, the condition of which is in the precise words and form prescribed by the Act of 1839, [Clay's

BONDS AND COVENANTS--CONTINUED.

Dig. 577, § 11,] and refers specially to the act by virtue of which the bond was executed, and on which is endorsed the oath prescribed by the act, subscribed by the treasurer, is a good statutory bond, although it does not recite that the principal obligor is the county treasurer, or that he was elected as such. *Ib.*

7. A bond taken by the justice of the peace from a party charged with the paternity of a bastard, conditioned for his appearance at court, &c., as required by the statute, (Clay's Dig. 134, § 2.) is properly made payable to the Governor of the State for the time being and his successors in office.—*Chaudron* v. *Fitzpatrick, Gov'r.*, &c., 649

8. A stranger cannot sue upon a deed which only contains covenants between the parties, although it may contain an express covenant for his benefit.—*Douglass* & *Easton* v. *The Branch Bank at Mobile*, 659

9. A bond for titles, executed by commissioners who are appointed by the Orphans' Court to sell the real estate belonging to a decedent, conditioned that the commissioners shall make or cause to be made to the obligee a fee simple title to the land, is binding upon the obligors personally, when they exceed their authority and fail to bind the decedent's estate.—*Whiteside* v. *Jennings*, 784

10. The obligee's notes given for the purchase money of the land constitute a sufficient legal consideration for the execution of the bond. *Ib.*

11. *It seems*, that the measure of damages in an action on a bond for titles is the value of the land at the time of the breach. *Ib.*

CAMP-HUNTING.

1. In an indictment for camp-hunting, under the Act of February 5, 1846, (Pamphlet Acts, p. 144,) a count which only charges the defendants with having formed themselves into a company consisting of more than five for the purpose of camp-hunting, is fatally defective.—*Underwood et als.* v. *The State*, 532

2. A count which charges that the defendants came into the county of Covington for the purpose of camp-hunting, and that they did camp-hunt therein, but does not allege that they hunted together, or in a company of more than five persons, is also defective. *Ib.*

3. The act of February 5, 1846, does not prevent citizens of other counties from camp-hunting in the county of Covington, except in companies of more than five persons. *Ib.*

CASE, ACTION ON THE

1. A count *in case* for a malicious prosecution must aver the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof.—*Sheppard* v. *Furniss*, 760

2. Case is the proper remedy for the malicious use of process regularly issued from a court of competent jurisdiction; but when the proceeding complained of is merely irregular, trespass is the remedy. *Ib.*

3. The form of action adopted by the pleader does not always determine the character of the count; but it may be adjudged a count in trespass, or a count in case, according to the facts stated in it, and

CASE, ACTION ON THE--CONTINUED.

the conclusions which the law draws from those facts. *Ib.*

5. A count in trespass cannot be united in a declaration with a count in case. *Ib.*

CERTIORARI.

1. A certiorari does not lie to review the sentence of the Commissioners' Court, refusing to establishing a private road.—*Brooks* v. *Kirby*, 72
2. A certiorari from the County Court does not lie to review the judgment of a Justice of the Peace, in a proceeding instituted under the Act of 1841, (Clay's Dig. p. 358, § 3.) to recover damages, where the amount claimed does not exceed twenty dollars.—*Winn* v. *Freele*, 171
3. A certiorari to review the judgment of a Justice of the Peace cannot be regularly sued out after the expiration of three years from the rendition of the judgment.—*Enis* v *Ross*. 239
4. When the defendant against whom a judgment has been rendered by a Justice of the Peace, removes the cause by *certiorari* into the County Court, a judgment of *non pros.* cannot be rendered against the plaintiff, unless he has been notified of the issuance of the *certiorari.*—*Crownover* v. *Srygley*, 251
5. *It seems*, however, that cases removed from Justices' Courts by *certiorari*, are not embraced in the statute, (Clay's Dig. 315, § 17,) which secures to the appellee a right to notice of an appeal from the judgment of a Justice of the Peace. *Ib.*
6. When a judgment is rendered by a Justice of the peace and the case is taken by certiorari to the Circuit Court, the certiorari should not be dismissed because the penalty of the bond is less than the amount prescribed by the order of the judge by whom the writ was granted. *McClellan* v. *Allison*, 671

CHANCERY.

1. If a person having an incumbrance or security upon an estate conceals his interest, and thereby enables the owner of the estate to obtain an additional advance upon it, he will be postponed in a court of equity, to the second incumbrancer.—*Chapman et als.* v. *Hamilton et als.* 121
2. When the record of the Orphans' Court contains no report or decree of insolvency, a mere recital in the order of publication against creditors, that the estate had theretofore been reported and declared insolvent, does not give the Court of Chancery, to which the cause has been transferred, jurisdiction to proceed to a settlement of the estate as an insolvent estate.—*McBroom's Adm'rs* v. *McBroom's Creditors*, 173
3. To entitle a party to relief in equity against a judgment at law, when his defence could have been made in the court of law, he must show *first*, that his failure to make a defence was not attributable to his own omission, neglect or default; and, *secondly*, that he has a good defence in the entire cause of action, or to such part of it as he proposes by his bill to litigate.—*Hair & Labuzan* v. *Lowe*, 224
4. When a garnishee comes into a court of chancery to be relieved against a judgment at law, which has been rendered against him by

CHANCERY—CONTINUED.

default, he should show by his bill, not only that he is not indebted to the defendant in attachment, but also that he has no effects in his hands belonging to said defendant. *Ib.*

5. When a judgment has been rendered by default against a garnishee, and the evidence clearly shows that the failure to defend at law is attributable to his own neglect, he cannot be relieved in equity against the judgment. *Ib.*

6. When lands are sold under an execution against the principal debtor, and purchased by one of his sureties with money belonging to himself and another co-surety, a third co-surety cannot claim to participate in the benefit of the purchase as an indemnity against his liability with the other sureties.—*Crompton et als.* v. *Vasser, ex'r.* 259

7. Courts of equity will not enforce, as in favor of a volunteer, a purely voluntary trust which is executory.—*Ib.* 260

8. But when a person has constituted himself a trustee for another, and the relation of trustee and *cestui que trust* has been fully established, the trust may be enforced in equity for the benefit of the *cestui que trust*, although he is a mere volunteer *Ib.*

9. If the complainant is not entitled to relief upon the original bill, matters which subsequently occur, and which are averred by way of supplemental bill, cannot cure the defect.—*Land & Wife* v. *Cowan et als.* 297

10. When a remainderman files a bill *quia timet*, to protect his interest in certain slaves, an allegation in the bill that one of the defendants seized upon, and took possession of the negroes, from and out of the possession of the tenant for life, and that he has ever since exercised, and claims to exercise full control over them, and has placed them in the possession of another defendant, who still retains them, does not warrant the presumption that he took them as a trespasser, or that he holds them otherwise than in subordination to the true title. *Ib.*

11. A remainderman cannot complain of a trespass upon the tenant for life, unless such trespass in some way endangers his remainder. *Ib.*

12. Every fact essential to entitle the complainant to the relief which he seeks, must be averred in the bill, and relief cannot be granted for matters not alleged, although they may be apparent from other parts of the pleadings and evidence. *Ib.*

13. A testator bequeathed a negro girl and her increase to his grand children, and provided that the negroes should remain undivided until the youngest child arrived at the age of twenty-one years, and should then be divided among those who were living. A division was made among the children before the youngest had attained his majority, and he afterwards filed a bill to have the division set aside, alleging that he had not received an equal share with the others. *It was held,*

1. That the bill would not be dismissed by the appellate court on account of a formal defect in not offering to account for the negroes which the complainant had received, the objection not having been taken in the primary court,

CHANCERY—CONTINUED.

2. That the negroes were exempt from execution at law against any of the legatees, until the youngest child had arrived at the age of twenty-one, and a division had been made pursuant to the will.
3. That until that time, the marital rights of the husband of a *feme covert* legatee did not attach, although he had possession of some of the negroes as bailee.
4. That one of the legatees who disclaimed all interest in the negroes, having sold his interest to another legatee before the division was made, was a competent witness for the complainant to prove his minority at the time the division was made.—*Johnson et al.* v. *Culbreath*, 348.

14. A court of equity will not specifically enforce a parol gift of land. *Evans* v. *Battle et als.* 398.

15. But when the donee has taken possession of the land under the parol gift, and made improvements thereon, equity will not allow the donor to reclaim the possession, without making compensation to the donee for the improvements. *Ib.*

16. R. & H. filed their bill in equity against E. T. R. and W. R., seeking to condemn to the satisfaction of a judgment at law, which they had obtained against the said E. T. R., (on which judgment an execution had been issued and returned "No property found,") his interest in certain lands and slaves which had been bequeathed by his father to W. R., "to have and to hold the same in trust for the benefit of E. T. R., but the same shall not be subject to the payment of any debt that he may owe, nor shall the rents and profits of the land or the hire of the slaves be applied for the same object, but the same shall be held for the use and benefit of the said E. T. R. and his family, during the term of his natural life, and from and after his death to the use of such persons as the same may be devised and bequeathed by the said E. T. R. in his will; and in the event no will shall be made, then to the heirs at law of the said E. T. R." The defendant insisted that he did not have such an interest in the property bequeathed as could be subjected to the payment of his debts, and also relied on his discharge under the Bankrupt Act, obtained subsequently to the rendition of the judgment against him. R. & H. did not prove their claim in the Bankrupt Court against E. T. R., nor was his interest in the trust property surrendered in his schedule by E. T. R. The chancellor dismissed the bill, but the appellate court reversed his decree, and held that the interest of E. T. R. in that portion of the property from the employment of which a revenue was to be derived was capable of separation, by an account ascertaining his share in the net product, and that such share, when so ascertained, was liable to be subjected to the payment of his debts. The cause was remanded, that an account might be taken, and that other parties might be added. The bill was amended by making the wife and children of E. T. R., and also the assignee in bankruptcy, parties defendants. It was proved, *inter alia*, that after the testator had made his said will, he verbally requested W. R. to give to said E. T. R. a certain ware-

CHANCERY—CONTINUED

house and ten acres of land; that W. R. afterwards refused to comply with the request, but permitted E. T. R. to rent out the property and receive the rent for three or four years; that T., to whom the property was rented for one year, executed his note for the rent payable to W. R., together with a mortgage on two slaves, to secure its payment; that the slaves were sold under the mortgage, and purchased by W. R. in his own name, and were afterwards delivered by him to E T. R.; that E. T. R. had purchased three negroes from W. R., which were to be paid for out of the trust estate, but the purchase money had not been paid. W. R. claimed to have a mortgage on said three negroes for the payment of the purchase money, but no proof was made relative to it. *It was held*,

1. That the correctness of the former decision of the appellate court could not be questioned, either by the assignee in bankruptcy or by the wife and children of E. T. R., inasmuch as the former was not injured by said decision, and the interest of the latter was fully represented before the court at that time by the trustee.
2. That the amendment only put in issue such facts as would avoid the discharge in bankruptcy, which the original defendants had set up, or show that it did not operate on the property sought to be condemned, and was therefore not obnoxious to the objection of making a new case different from that presented by the original bill.
3. That the legal title to the slaves purchased under the mortgage did not vest in E. T. R. until the delivery to him, and until that time he did not have such a beneficial interest in them as could be subjected by his creditors, at law or in equity, to the satisfaction of their demands.
4. That the omission of E. T. R. to include in his schedule his interest in the trust property, thus bequeathed by his father, was not such a fraud or wilful concealment as would vacate *in toto* his certificate of discharge as a bankrupt.
5. That a charge in the bill that the failure of E. T. R. to surrender in his schedule his interest in the trust property *amounted in law* to a fraud which should vacate his discharge, was not equivalent to a charge of fraud or wilful concealment of his property.
6. That although it is a general rule, that to enable the creditor of a bankrupt to maintain a suit in equity to subject to the satisfaction of his debt property belonging to the bankrupt, he must allege in his bill some collusion between the assignee and the debtor, or that the assignee refuses to bring suit, yet when the assignee has neglected for more than five years to institute proceedings to obtain the condemnation of the bankrupt's interest in certain trust property, and in the meantime a creditor has ferreted out that interest, and after a protracted litigation, obtained a decree subjecting it to the satisfaction of his debt, the assignee will be presumed to have abandoned his claim, and he cannot assert it against such creditor.
7. The assignee having no claim to the property which he could as-

CHANCERY--CONTINUED.

sert against the complainants, none of the other defendants could take advantage of E. T. R.'s discharge under the Bankrupt Act.

8. That the State courts have jurisdiction of the case established by the bill, answers and evidence. The rules of interpretation which obtain in the Federal courts as to the construction of the Bankrupt Act will be applied by the State courts.

9. That W. R. and E. T. R. having admitted in their answers the due issuance and return of the execution against E. T. R., an objection to the sufficiency of the return could not afterwards be raised, either by them or any of the other defendants.

10. That a defendant cannot raise the objection that an execution was not sent to the county of his residence, unless he shows that he had visible property in that county which was liable to its satisfaction.

11. That the other creditors of E. T. R. were not necessary parties.

12. That it was not necessary or proper, in stating the account, that any allowance should be reported for the family of E. T. R.

13. That E. T. R. was not entitled to compensation for his services in superintending the trust estate, no such claim having been set up in his answer, and no proof made before the master of any contract between him and trustee for such compensation.

14. That the three negroes which were purchased from W. R. by E. T. R. were properly taken into the estimate in stating the account. *Rugely & Harrison* v. *Robinson*, 404

17. The original jurisdiction of the Court of Chancery is not affected by the statutory jurisdiction conferred upon the Orphans' Court, over the settlement of estates, except when prohibitory or restrictive words are used denying to the Court of Chancery the exercise or continuance of its jurisdiction.—*Gould* v. *Hayes et al.* 438

18. The Court of Chancery may take cognizance of the settlement of an executor's administration after it has been commenced in the Orphans' Court, when there are complicated matters of account to be settled, and trusts to be executed, which the Orphans' Court cannot enforce. *Ib.*

19. W. M. placed in the hands of A. M., who was bound as surety for him on several debts, certain bonds of the Montgomery R. R. Company, with the understanding that A. M. should endeavor to collect them and should apply the proceeds to the payment of the debts for which he was bound as surety. G. and other judgment creditors of the R. R. Company afterwards filed a bill against A. M. and other stockholders, for the purpose of condemning their indebtedness to the company to the satisfaction of complainants' judgments against it, the company being insolvent. A. M., before the service of the subpœna upon him, paid some of the debts for which he was bound as surety for W. M., and after he had been served with process, the whole amount of the bonds assigned to him by W. M. was passed to his credit on the books of the company. A settlement of their accounts was afterwards made between A. M. and W. M., in which

CHANCERY—CONTINUED.

A. M. accounted for the bonds which he had received, at their market value, fifty cents on the dollar. *It was held*,

1. That A. M. was entitled to a credit on his indebtedness to the company, of the amount which he had paid as surety for W. M. before the service of the subpœna upon him.

2. That his right to retain, as against the complainants, only extended to the *amount actually paid by him*, and was not affected by the depreciation in the market value of the bonds, or the subsequent settlement between him and W. M.—*Godwin et als.* v. *McGehee et als.* 468

20. A court of equity will decree the specific execution of a parol agreement to sell or convey land, notwithstanding the statute of frauds, when there has been such a part performance of the agreement that to refuse it would work a fraud on the party seeking its specific execution.—*Brewer* v. *Brewer & Logan*, 481

21. A vendee who has obtained the possession of land under a parol contract and in pursuance of its terms, and has paid the entire purchase money, is entitled in a court of equity to a specific execution of the contract. *Ib.*

22. T., being in possession of a quarter section of land to which he had a pre-emption right, agreed by parol with G. that G. should pay the whole of the entrance money to the government, and in consideration thereof should have one-half of the land. G. paid the entrance money accordingly, and took a patent in his own name. *Held*—That these facts were tantamount to a payment of the purchase money, and entitled T. to a specific execution of the contract. *Ib.*

23. When the specific execution of a parol agreement would be decreed between the immediate parties thereto, it will also be decreed between parties claiming under them, unless some controlling equity intervenes which would render it improper, according to the rules by which courts of equity are governed, to decree its specific execution. *Ib.*

24. When a party purchases land in the possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights binding on his vendor, and he cannot set up the want of notice to protect himself. *Ib.*

25. When the complainant's conduct has not been the basis of the acts of the person through whom the defendant claims, and his silence has not misled any one, he will not be held to have forfeited his equitable rights by the mere failure or omission to assert them. *Ib.*

26. The statute conferring upon the registers in chancery power to appoint trustees in certain cases, (Clay's Digest, 350, § 33, and Pamphlet Acts of 1845-6, p. 16.) is not unconstitutional in vesting *quasi* judicial powers in officers who are not elected, commissioned and qualified as judges are required to be by the constitution.—*Gaines* v. *Harvin*, 491

27. An equitable title to land cannot be sold under execution at law, but resort must be had to a court of equity.—*Wilson* v. *Beard*, 629

28. A father, who by reason of his poverty and bodily infirmity has be-

CHANCERY—CONTINUED.

come unable to support his infant daughter, has a right to resort to the court of equity which has appointed a trustee of her estate, to have an allowance for her support and education decreed to be paid by such trustee out of the annual income of her estate.—*Watts* v. *Steele, trustee,* 656

29. When a lease of real estate belonging to the Bank is executed in the name of the assistant commissioner, and the rent due thereby is to be paid to the Bank, equity will decree a reformation of the contract and a specific performance against the Bank.—*Douglass & Easton* v. *The Branch Bank at Mobile,* 659

30. A party seeking relief in equity against a judgment at law, on the ground that he was ignorant of his defence until after the rendition of the judgment, must show the exercise of ordinary diligence to discover it, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his own part.—*Perrine* v. *Carlisle,* 686

31. The defendant in a judgment has a full and complete remedy at law, by *supersedeas*, to obtain credit for a part payment of the judgment, and consequently such payment constitutes no ground for equitable relief. *Ib.*

32. When a bill is filed for relief, and the jurisdiction of the court is sought to be maintained on the ground of discovery alone, the bill should allege that the complainant is unable to prove the facts upon which he relies for relief otherwise than by the answer of the defendant. *Ib.*

33. A court of equi y will not interfere at the suit of one of the defendants in a judgment at law, to compel the plaintiff to collect his judgment out of another defendant, who by agreement with his co-defendant had bound himself to pay it.—*Skinner* v. *Barney et als.* 698

34. When parties have a joint legal title to personal property, an equity existing between themselves will not enable them as complainants to file a bill in chancery, to redress an injury done to their joint legal title.—*Comby et als.* v. *McMichael et als.* 747

35. A *feme sole* conveyed her undivided interest in certain personal property, which had been bequeathed to her and her brothers and sisters by their father, to a trustee, in trust that he should take the same into his possession when divided, and hold it for the use and benefit of herself and the issue of her body, and at her death should convey the same to such of her issue as might then be living. She afterwards married, and her portion of the slaves after division went into the possession of her husband. After her death her children filed a bill for the recovery of the slaves, against their father and others claiming under him. *It was held,*

1. That the complainants' title, if they had any at all, was a legal title for which they had a perfect legal remedy.
2. That the prayer for a division of the slaves among the complainants did not give the court jurisdiction to render a decree against the defendants.—*Ib.* 748

CHANCERY—CONFINUED.

36. Mere inadequacy of consideration, within itself, and disconnected from all other facts, is not a sufficient ground for setting aside a contract, or granting relief against it in equity.—*Judge* v. *Wilkins*, 765

37. When a debtor becomes insolvent, and executes a deed of trust to secure certain of his creditors, a court of chancery will make a *pro rata* distribution of the proceeds among all the creditors who are provided for, when the deed creates no preference among them.—*Branch Bank at Mobile* v. *Robertson et als.* 798

38. The court of chancery has jurisdiction over bequests to charitable uses by virtue of its original common law powers, without claiming prerogative powers, or invoking the aid of the statute of 43 Elizabeth. *Carter & Wife et als.* v. *Balfour's Adm'r*, 815

39. Whether the statute of 43 Eliz. is in force in this State—QUERE? *Ib.*

CHANCERY PLEADING AND PRACTICE.

1. When service of process upon non-resident defendants has been perfected by publication only, the record must show that the publication was made in the manner pointed out by the 40th Rule of Chancery Practice.—*Beavers et als.* v. *Davis*, 82

2. When the interest of an absent defendant is affected by the decree, and he has not been personally served with process of *subpœna*, within this State, nor voluntarily submitted to the jurisdiction of the court, it is erroneous to render a final decree without the bond required by the Act of 1805.—(Clay's Dig. 353, § 45.) *Ib.*

3. A demurrer to a bill for the want of parties must show who the proper parties are, in such a manner as to point out the defect in the bill, and enable the complainant to amend it.—*Chapman et als.* v. *Hamilton et als.* 121

4. To a bill which seeks to subject to the satisfaction of the complainant's claim, the undivided interest of a distributee in an estate while yet in the hands of the administrator, all the distributees are necessary parties. *Ib.*

5. When a bill is demurrable on its face, for the want of proper parties defendants, and the defendant, instead of demurring alone, answers, and shows by his answer, that there is no other necessary party, the court may proceed to a final decree, without regard to such a formal defect in the bill. *Ib.*

6. If a creditor who has a lien upon two funds for the security of his debt, files a bill seeking to condemn one of them, the bill is not *demurrable*, because it does not show what disposition has been made of the other. *Ib.*

7. A decree will not be reversed, because a party defendant, who has in his hands the fund sought to be condemned, is sued as *administrator*, instead of *guardian*, when it appears that the estate has been settled; that all the parties interested in the fund are before the court; and that no injury has been done to any one. *Ib.*

8. When the order transferring a cause from the Orphans' Court to the Court of Chancery, assigns no reason for the transfer, but the record

CHANCERY PLEADING AND PRACTICE—CONTINUED.

discloses a sufficient reason, and the parties appear and proceed with the cause, without objection, in the Court of Chancery, an objection to the jurisdiction of that court, on account of a mistake in the decree, setting forth the reason of the transfer, cannot be raised in the appellate court, and the mistake itself is immaterial.—*McBroom's Adm'rs* v. *McBroom's Cred'rs*, 173

9. A mistake in the given name of the party against whom a decree has been rendered, when the true name appears in the record, is a clerical misprision, and will be corrected in the appellate court, at the cost of the plaintiff in error *Ib.*

10. When the record of the Orphans' Court contains no report or decree of insolvency, a mere recital in the order of publication against creditors, that the estate had theretofore been reported and declared insolvent, does not give the Court of Chancery, to which the cause has been transferred, jurisdiction to proceed to a settlement of the estate as an insolvent estate. *Ib.*

11. When the assignor of a note and his assignee join in a bill, the admissions of the assignor before the commencement of the suit are sufficient evidence of the assignment.—(Overruling Moore et al. v. Hubbard, 4 Ala. 187.)—*McLane & Plowman* v. *Riddle & Burt*, 180

12. The title of the assignee of a note, in a bill filed jointly with his assignor, is sufficiently established by proof that the note was assigned *in liquidation of a debt* due to him from his assignor, although the bill alleges that it was assigned *as collateral security.* *Ib.*

13. When an amendment to a bill is properly allowed, the appellate court will not review the decision of the chancellor in allowing the amendment without terms.—*Ib.* 181

14. The purchaser of an equity of redemption, at a sale made by order of the Orphans' Court, is a necessary party to a bill which seeks a foreclosure of the mortgage.—*Hall et als.* v. *Huggins et als.* 200

15. The general rule that an objection for want of proper parties defendants must be taken by demurrer, plea or answer, and cannot be raised for the first time at the hearing, applies only to those cases in which a decree may be rendered and relief granted in conformity to the prayer of the bill, without the probability of injury to the rights of those who are not made parties.—*Woodward* v. *Wood*, 213

16. All the mortgagees in whom is vested the legal title, are necessary parties to a bill to redeem, filed by the assignee of the equity of redemption. *Ib.*

17. When a special authority is vested in one or more of the mortgagees for the benefit of all, all have an interest in the exercise of that authority, and a decree cannot be rendered affecting their interest unless they are all made parties to the bill. *Ib.*

18. If the mortgagee is only a trustee for another, the *cestui que trust* is a necessary party to a bill to redeem, unless some special reason is shown why he may be dispensed with. *Ib.*

19. When the principal debtor executes a mortgage to secure his sureties on a debt due to the bank, the bank is a necessary party to a

CHANCERY PLEADING AND PRACTICE—CONTINUED.

bill to redeem filed by the assignee of the equity of redemption, unless the bill alleges that the debt has been paid. *Ib.*

20. A bill which seeks to enforce the execution of a trust in the name of a mere volunteer, and for his benefit, must allege a declaration of the trust in his favor.—*Crompton et als.* v. *Vasser, Ex'r.*, 259

21. Courts of equity put the same construction on the statutes of set-off, in the absence of all intervening equities, as do the courts of law. —*McKinley v. Winston*, 301

22. A bill which charges the defendant's habitual intoxication, and his violence resulting therefrom as evidenced by his threats and abuse, "that he used the most gross and abusive language toward complainant, cursing her, and compelling her through fear of his violence to seek safety in quitting his presence, that he made threats of personal violence; such as would endanger her personal safety, as well as her life and limbs," and specifies particular instances of his misconduct, substantially alleges sufficient to entitle the complainant to the relief prayed, and puts the defendant in possession of the charges to be proved against him.—*Hughes* v. *Hughes*, 307

23. In suits for divorce, a sworn answer denying the allegations of the bill does not impose upon the complainant the necessity of establishing her case by two witnesses, or one witness with corroborating circumstances. The statute [Clay's Dig. 170, § 6,] merely contemplates a formal denial of the allegations of the bill, and does not require a sworn answer. *Ib.*

24. If the allegations of the bill do not correspond with the evidence, no decree can be rendered in favor of the complainant, although the proof may show that he is entitled to equitable relief.—*Evans* v. *Battle et als.*, 398

25. A testator by will directed that his estate should be kept together until his eldest son arrived at the age of twenty-one, and that the profits derived therefrom, after paying the expenses of his plantations, &c., together with all moneys accruing to his estate from other sources, should be invested in bank stock to constitute a permanent fund, of which the interest or dividends should be equally divided among his children. After the removal of the executor from office, the distributees filed a bill against him, charging him with waste, negligence, &c., and praying an account and settlement of his administration. *It was held*,

1. That the complainants occupied the position of residuary legatees, and must bring before the court all persons interested in the fund which they sought to appropriate.
2. That the administrator *de bonis non* was a necessary party defendant, and that the bill should show that no claim of his was set up, or, if set up, that it constituted no charge upon the fund sought to be condemned which should intervene between the complainants and an absolute appropriation of the fund to their benefit.
3. That the creditors, if any, should be brought in before the master in taking the account, as in case of a creditor's bill.

CHANCERY PLEADING AND PRACTICE—CONTINUED.

4. That advantage might be taken on *general demurrer* of the want of proper parties.—*Gould* v. *Hayes et al.*, 438

26. The omission of an indispensable party is an error for which a decree may be reversed, although the objection is taken for the first time in the Appellate Court. *Ib.*

27. In general, a court will not decree interest on a balance unless it is specially asked for in the bill, but this rule applies only to intereest due at the time the bill was filed. When the interest accrues subsequently, it is the practice of the court, upon further directions, to order that the interest be computed, although there is no prayer in the bill to that effect.—*Godwin et als.* v. *McGehee et als.*, 468

28. A decree of divorce against a non-resident defendant, upon whom service has been perfected by publication in the manner prescribed by the statute, is equally as obligatory upon the defendant as if he had been personally served with process, or had appeared and answered the bill.—*Harrison* v. *Harrison et als.*, 499

29. When a wife abandons her husband in this State and removes to another State, and after the expiration of three years he files a bill against her for divorce, he may proceed against her as an absent defendant, although she has not resided in this State during the three years. The desertion with intention of abandonment, which is the cause of complaint, having originated here, it is immaterial where the defendant resides during the three years subsequent thereto. *Ib.*

30. The infant is not an indispensable party to a bill filed by her father against the trustee of her estate, to have an allowance for her support and education decreed to be paid by the trustee out of her annual income.—*Watts* v. *Steele, Trustee*, 656

31. When the purchaser of land files a bill seeking to be relieved against the payment of a part of the purchase money on the ground of a deficiency in the quantity of land, and does not allege in his bill that there was any fraud or mistake in the execution of the deed, or that any language not truly expressive of the contract had been inserted therein, or any part of the contract omitted, the deed of conveyance must be taken as conclusive evidence of the terms of the contract.—*Frederick* v. *Youngblood*, 680

32. A fact occurring subsequently to the filing of the original bill must be averred by way of supplemental bill, and cannot be brought to the knowledge of the court by amendment.—*Colins et als.* v. *Lavenberg & Co.*, 682

33. A party seeking relief in equity against a judgment at law, on the ground that he was ignorant of his defence until after the rendition of the judgment, must show the exercise of ordinary diligence to discover it, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his own part.—*Perrine* v. *Carlisle*, 686

34. The defendant in a judgment has a full and complete remedy at law, by *supersedeas*, to obtain credit for a part payment of the judg-

CHANCERY PLEADING AND PRACTICE—CONTINUED.

ment, and consequently such payment constitutes no ground for equitable relief. *Ib.*

35. When a bill is filed for relief, and the jurisdiction of the court is sought to be maintained on the ground of discovery alone, the bill should allege that the complainant is unable to prove the facts upon which he relies for relief otherwise than by the answer of the defendant. *Ib.*

36. Relief will not be decreed to a complainant upon the case established by the answers and evidence, when it is directly opposed to the allegations of the bill.—*Skinner* v. *Barney et als.*, 698

37. A bill is not multifarious which is filed by a single complainant as administrator *cum testamento annexo* of two estates which are so blended and so nearly the same that it is necessary to proceed under both wills at the same time, and which asks the direction of the court, for the complainant's protection, in the construction of the wills, the distribution and administration of the estates, the establishment of certain charitable bequests contained in one of the wills, the marshalling of the assets, and, contingently, contribution from the legatees for the payment of debts.—*Carter & Wife et als.* v. *Balfour's Adm'r.*, 814

38. To such a bill all persons interested in the two estates, either as legatees or distributees, are proper parties defendants. *Ib.*

39. When a pecuniary legacy, bequeathed to children who die during infancy leaving no issue, brothers or sisters, is received by their father after their death, his title is *prima facie* good, and requires no action of the court to settle it; and therefore the personal representative of the infants is not a necessary party to a bill filed by their father's administrator, asking the direction of the court in the construction of his will, the establishment of certain charitable bequests created by it, the marshalling of the assets, distribution of the estate, &c. *Ib.*

CHARITABLE SOCIETIES, BEQUESTS TO.

1. A clause of a will in these words, viz: "*After my debts are paid, the remainder of my property of whatever kind or nature,* I give and bequeath to my beloved wife," &c. does not conflict with, or destroy a preceding clause containing a bequest to certain benevolent societies. The word "*remainder*" in the subsequent clause must be construed to mean the residue of the testator's estate after deducting the previous bequests and paying debts.—*Carter & Wife et als.* v. *Balfour's Adm'r.*, 815

2. In such case, the wife takes the whole estate charged with the payment of the charitable bequests at her death. *Ib.*

3. A bequest to "the Baptist Societies for Foreign and Domestic Missions, and the American and Foreign Bible Society," is valid and sufficiently specific; and if societies can be found, which were organized and known by those names at the time of the testator's death, they will be considered the societies referred to in the will, and capable of taking the bequest, whether incorporated or not. *Ib.*

CHARITABLE SOCIETIES, BEQUESTS TO—CONTINUED.

4. But if such societies did not exist at the time of the testator's death or cannot now be found, the bequests must be considered and disposed of as lapsed legacies. The doctrine of *cypres*, as applied to bequests to charitable uses, is not recognized in this State. *Ib.*
5. The court of chancery has jurisdiction over bequests to charitable uses by virtue of its original common law powers, without claiming prerogative powers, or invoking the aid of the statute of 43d Elizabeth. *Ib.*
6. Whether the statute of 43 Eliz. is in force in this State—QUERE? *Ib.*
7. *It seems*, that English statutes passed before the emigration of our ancestors to America, which were applicable to our situation, and not inconsistent with our institutions and government, constitute a part of the common law, and are in force (unless repealed,) in all the States of the Union. *Ib.*
8. When a testator bequeathes the whole of his estate, after the payment of his debts, to his wife, charged with the payment, at her death, of a pecuniary legacy to certain charitable societies, and the wife afterwards by her will disposes of the whole personal estate in specific legacies, and leaves the real estate undisposed of, the real estate must first be subjected to the payment of the debts and charitable bequests. *Ib.*

COMMISSIONERS' COURT.

1. A certiorari does not lie to review the sentence of the Commissioners' Court, refusing to establishing a private road.—*Brooks* v. *Kirby*, 72
2. Whether a mandamus from the Circuit Court would not lie, to require the Commissioners' Court to proceed and exercise its discretion, when the record shows that its action was not predicated upon the facts, as they might have been made to appear, but, upon a supposed legal insufficiency of the petition, which induced the court to repudiate the application.—QUERE? *Ib.*
3. The Commissioners' Court cannot be compelled, by *mandamus* from the Circuit Court, to make an appropriation for the payment of claims against the county, before they have been audited and allowed.—*Falkner* v. *The Judge and Commissioners of Randolph County*, 177

CONSTABLES.

1. The admissions of an officer are not evidence against his securities, unless they are made while in the performance of some official act or duty, connected with the transaction, out of which the breach of the condition of his bond is alleged to have arisen.—*Dennis & Strickland* v. *Chapman, Gov., &c.*, 29
2. A constable who has levied executions on personal property, while they are in force, may sell after the return day of the writs; and his receipt of the money upon a sale, and a failure to pay it over according to law, will subject his securities to liability therefor. *Ib.*
3. A constable, who has collected money on an execution, is an incompetent witness, without a release, to prove that he has paid it over to the justice of the peace who issued the execution.—*McGrew & Beck* v. *The Governor, use, &c.*, 89

CONSTRUCTION.

1. In the construction of written instruments, the intention of the parties must govern, and to ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view.—*Strong et al.* v. *Gregory*, 146

2. Debt on bond executed by defendant, payable to plaintiff as administrator of G. M. R. deceased. Defendant craved oyer of the condition which was set out, and pleaded several special pleas, each averring performance. The condition recited, that defendant, said G. M. R, and two others had become securities for one M. as receiver in a chancery suit, that M. had made default, and plaintiff, as administrator of G. M. R., had paid a certain amount on account of said default, and to secure the same had taken from M. his six promissory notes, (which are described,) with a mortgage on his real and personal estate. It then concludes, "Now in the event the said M. shall fail to pay said notes, and the mortgaged property prove insufficient to pay the same on a sale thereof, and the said W. H. R. (plaintiff,) be unable to collect said notes of said M. at law, then shall I pay said W. H. R. one-fourth of the final amount of loss he may sustain by reason of his paying up said default as aforesaid, then this obligation to be void," &c. The plaintiff replied the mortgage, with its objects and stipulations, and his sale of the property under a power contained in the mortgage, the proceeds to be applied to the aggregate sums mentioned in the notes; also, that he commenced suit against M. to recover the aggregate amount of said notes, as he was authorized to do under the terms and stipulations of the mortgage, and recovered judgment on which an execution was regularly issued and returned "no property found," and that said notes remain unpaid except to the extent of the money arising from said sale. Defendant craved oyer of the mortgage, and demurred to the replication. The mortgage recites all the facts which are recited in the condition of the bond, and provides that in the event said M. should fail to pay each of said notes at maturity, or within ninety days thereafter, then all of said notes should be forthwith due and payable, and plaintiff might forthwith commence suit at law, or in chancery, "for the recovery of the whole debt covered by said six notes." And in the event of such default, the mortgage contained a power of sale, the proceeds to be applied to the payment of said debt and interest, and the balance, if any, to be paid to said M. The notes, bond and mortgage were all executed on the same day. *It was held*,

1. That the replication was substantially good.
2. That the mortgage is to be taken as part of the subject matter of the contract shown by the condition of the bond, and as part of the condition in effect.—*Rives, adm'r*, v. *Toulmin*, 288

3. When an assignment is written on the back of a deed to which it refers in express language, and conveys the same property, the deed may be looked to in construing the assignment.—*Cuthbert* v. *Wolfe*, 374

CONSTRUCTION—CONTINUED.

4. In the construction of deeds if there are two clauses which are inconsistent and irreconcilable with each other, the last must give way to the first.—*Petty et als.* v. *Boothe et als.* 634
5. When subsequent words in a deed are of doubtful import, they will not be so construed as to contradict preceding words which are certain. *Ib.*
6. The words "be the same more or less," when used in a deed in stating the quantity of land conveyed by it, mean that the parties shall run the risk of gain or loss, and that if the quantity prove greater or less than that stated, they shall nevertheless abide by their bargain.—*Frederick* v. *Youngblood*, 680
7. A retrospective operation will never be given to a statute, unless the intention clearly appears on its face that it should so operate.—*Barnes* v. *The Mayor & Ald. of Mobile*, 707
8. It is the duty of the court to construe a law or ordinance and gather its intention from the law itself, and not from contemporaneous avowals of the individual framers of it. *Ib.*

CONTRACT AND AGREEMENT.

1. When a party has entered into a special contract to do certain work, or perform a specified service, and the work is done, but not according to the terms of the contract, yet if it is accepted by the party for whom it was to be performed, and is beneficial to him, the party performing it may recover on a *quantum meruit*, the value of the work done, or service rendered.—*Hawkins* v. *Gilbert & Maddox*, 54
2. But if, after having commenced the work, he abandons it before it is finished, without sufficient cause, he cannot recover for the work and labor done.—*Ib.* 55
3. A subsequent parol agreement which is founded on no new consideration, and has been productive of no injury to the party who was to perform it, is not a waiver or discharge of a prior written contract, unless such subsequent agreement has been executed.—*Hunt & Hunt* v. *Barfield*, 117
4. A slave was sold at public auction under a mortgage executed by B. to the Bank, and bought in by the bank agent, who sold him the next day at private sale to W. W. afterwards discovering that the slave was unsound, refused to give his note for the purchase money, but tendered him back to the agent, and demanded a rescission of the contract, which the agent refused. It was afterwards agreed between them, that the slave should be re-sold under the mortgage to the Bank, and that W. should pay whatever difference there might be between the price on the re-sale, and that which he had originally agreed to give. The slave was accordingly re-sold under the mortgage, at public auction, and purchased by G. *Held*, that the re-sale under the mortgage did not amount to a rescission of the contract between W. and the bank agent, but that W. was the owner of the slave at the time of the re-sale, and the party really and beneficially interested in the re-sale.—*Ware* v. *Gilmer*, 252
5. The plaintiff was employed as a school teacher by the defendant

CONTRACT AND AGREEMENT—CONTINUED.

and others, by a written contract which specified the duties of the teacher, the rate of tuition, and the number of scholars to be sent by each subscriber. The school was to be taught in the school house belonging to the sixteenth section. Soon after the commencement of the school, an election for trustees of the township was held, at which election the plaintiff voted. *Held*, that the plaintiff was responsible for his conduct to the subscribers only, and that the trustees had no right to control or govern the school.—*Henderson* v. *Hammond*, 340

6. The rule is inflexible, that if a written instrument is perfect and complete of itself, parol evidence cannot be received to add another term to it or to change its legal effect.—*West & West* v. *Kelly's Ex'rs*, 353
7. If it is apparent, however, that the written instrument contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract. *Ib.*
8. A contract between the plaintiff and the defendant in execution, by which the plaintiff agreed to delay enforcing the collection of the execution until the ensuing term of the Supreme Court that the defendant might take the case up for revision, and the defendant, in consideration of the delay, agreed to pay ten *per cent.* on the amount of the execution if the case was affirmed, is usurious.—*Matlock* v. *Mallory*, 694
9. When the contract declared on is usurious on its face the declaration is demurrable. *Ib.*
10. Mere inadequacy of consideration. within itself, and disconnected from all other facts, is not a sufficient ground for setting aside a contract, or granting relief against it in equity.—*Judge* v. *Wilkins*, 765
11. A contract by which the plaintiff agreed to serve the defendant as an overseer for one year, to furnish a certain number of hands and horses which were to be worked on defendant's plantation with his hands and horses, to defray the expenses of himself, his hands and horses, and to receive one-fourth part of the crop raised as his compensation, does not make the parties partners *inter sese*.—*Moore* v. *Smith*, 774

CORPORATIONS.

1. A *scire facias* is the proper remedy in proceeding under the Act of February 6, 1843, (Clay's Dig. 515, § 39,) against an incorporated turnpike company for a forfeiture of its charter.—*The State* v. *Moore & Ligon*, 514
2. The Act of February 4, 1846, (Pamphlet Acts, 44,) under which an incorporated turnpike company may be indicted for a failure to keep their road in repair, does not deprive the State of the right to proceed for a forfeiture under the Act of 1843. *Ib.*
3. In proceeding by *scire facias* under the Act of 1843, against an incorporate company, the *scire facias* should allege that the defendants procured the act of their incorporation, or that they accepted it, or acted under it. *Ib.*

CORPORATIONS--CONTINUED.

4. The Solicitor of the circuit cannot, of his own volition, sue out a *scire facias* against an incorporated turnpike company for a forfeiture of their charter, but can only act under the direction of the Legislature, or of the Attorney General. *Ib.*

5. When a corporation is a party to a deed, a mistake in setting out its name will not vitiate the deed, if it is apparent from the face of it that the corporation was intended thereby.—*Douglass & Easton* v. *The Branch Bank at Mobile*, 659

See BANK AND BRANCHES, STATE.

COSTS.

1. When a county treasurer, who has instituted legal proceedings against the clerk of the county for certain demands due from him to the county, fails in his suit, and judgment is rendered against him for the costs, the costs of the suit are not an ascertained or established claim against the county in favor of any person.—*Falkner* v. *The Judge & Commssoners of Randolph County*, 177

2. When a guardian is charged with a particular sum which has been litigated, he is also properly chargeable with the costs attending the litigation of it.—*Hughes* v. *Mitchell*, 268

3. The Act of 1848, (Pamp. Acts, 95,) "to amend the several laws now in force in relation to the return of executions by sheriffs and coroners," does not repeal the act of 1840, (Clay's Digest, 311, § 31.) "to regulate the mode of collecting costs accruing in the Supreme Court." *Huggins* v. *Ball*, 587

COUNTY TREASURER.

1. A publication made by the defendant, of and concerning the plaintiff, which alleges substantially, that the town commissioners had placed in the hands of the plaintiff, as County Treasurer, notes to the amount of $1949 94; that the defendant notified him that the commissioners appointed by the Judge of the County Court to examine his office were in town, and willing to proceed with the investigation, but the plaintiff said he had not time for the investigation before the election, and refused; that the plaintiff and his friends had circulated the report that he had made the proposal to go into the examination, and that the defendant refused; that the commissioners made a slight examination of the plaintiff's papers, and found among them receipts of C, for $626 04; that the plaintiff accounted for the receipt of $276 55, and had vouchers for cash paid out $219 85, and cash on hand $35; that the defendant "warned" him to have his books and office examined, instead of the few papers which he had exhibited, but he refused; that the plaintiff only reported to the commissioners $276 55, as collected by him, as appeared from their certificate; and which then avers "that there has been $510 45 collected from the claims placed in his hands by said commissioners,"

COUNTY TREASURER—CONTINUED.

and annexes the names of the persons from whom collected, is not a libel, and its meaning cannot be enlarged by an inuendo, that the defendant thereby intended to charge the plaintiff with fraud, corruption, embezzlement, or other misconduct in his office of County Treasurer.—*Henderson* v. *Hale*, 154

2 When a county treasurer, who has instituted legal proceedings against the clerk of the county for certain demands due from him to the county, fails in his suit, and judgment is rendered against him for the costs, the costs of the suit are not an ascertained or established claim against the county in favor of any person.—*Falkner* v. *The Judge and Commissioners of Randolph County*, 177

3. When the official bond of a county treasurer is defective as a statutory bond, but good as a common law bond, suit can only be brought upon it in the name of the obligee.—*Wilson, use, &c.* v. *Cantrell et als.*, 642

4. An official bond of a county treasurer, the condition of which is in the precise words and form prescribed by the Act of 1839, [Clay's Dig. 577, § 11,] and refers specially to the act by virtue of which the bond was executed, and on which is endorsed the oath as prescribed by the act, subscribed by the treasurer, is a good statutory bond, although it does not recite that the principal obligor is the county treasurer, or that he was elected as such. *Ib.*

5. The eighteenth section of the act of 1839, [Clay's Dig. 580, § 27,] which inflicts a penalty on a county treasurer for a breach of duty, does not deprive a party, who is injured by such breach of duty, of his right to bring an action on his official bond against the treasurer and his sureties. *Ib.*

6. In an action of debt against a county treasurer and his sureties on his official bond, a recovery can only be had for injuries necessarily affecting the rights of the party for whose use the suit is brought. *Ib.*

COURT, CHARGE OF.

1. When the court refuses to give a charge requested, the party wishing to revise such refusal, must set out in the bill of exceptions so much of the evidence as will show that the charge requested was pertinent to the evidence, and was not abstract.—*Leverett's Heirs* v. *Carlisle, Ex'r.*, 80

2. When a witness speaks in her deposition of a conversation in which the donor had expressed an intention to give a slave to the donee, and also says, that the slave was given to the donee by the donor, at a certain time, and delivered to her, [the witness,] for him, it is erroneous to charge the jury that the latter statement cannot be regarded by them as showing a gift, but as at most only showing an intention to give, and as the conclusion of the witness. The whole testimony should be left to the jury, to determine whether a gift was not made, *in fact*, as consummated by the delivery.—*Nelson* v. *Iverson*, 95

3. When any portion of a charge requested is illegal, the court may refuse the charge *in toto*.—*Long* v. *Rogers*, 322

COURT, CHARGE OF—CONTINUED.

4. When the court below charges the jury that if they believe the evidence they must find for the plaintiff, the defendant seeking to revise the charge must either show that there was *conflicting* evidence before the jury, and that therefore the charge of the court invaded their province, or he must set out *all the evidence* in the record, that the Appellate Court may be able to determine whether the charge is sustained or authorized by it.—*Gaines* v. *Harvin*, 491
5. If the charge given by the court is legally correct, although the jury, from the general terms in which it is expressed, may be misled in applying it to the particular facts, yet an objection to it cannot be sustained. The party objecting should ask a more specific charge. —*Ewing* v. *Sanford*, 606
6. A charge is erroneous which asserts, that if the facts establish a want of probable cause malice is a necessary implication independent of the circumstances in proof. *Ib.*
7. In assumpsit against defendant for goods furnished to his minor son, the facts being proved from which the law will presume the son's authority to bind his father by such contracts, and no proof being offered to rebut this presumption, it is not error for the court to charge the jury that if they believe the evidence they must find for the plaintiff.—McKenzie v. *Stevens*, 691
8. When the bill of exceptions does not purport to set out all the evidence, the appellate court will presume, against the party executing, that an affirmative charge was sustained by the evidence.—*Jones* v. *Stewart*, 701

See APPELLATE COURT, 4, 7, 8.

CRIMINAL LAW.

1. When an appeal is taken to the Circuit Court from the judgment of a Justice of the Peace by which a party is required to find sureties to keep the peace, the Circuit Court is required to proceed with the examination *de novo*, and may therefore refuse to look to the legal sufficiency of the warrant under which the party was arrested.—*Tomlin et als.* v. *The State*, 9
2. The Circuit Court may render judgment for costs on the appeal bond, against the securities of a party who has appealed from the order of a Justice of the Peace, requiring him to find sureties to keep the peace. *Ib.*
3. A writ of error does not lie to revise the action of the Circuit Court in cases of appeal from the order of a Justice of the Peace, or other officer, requiring a party to find sureties to keep the peace. *Ib.*
4. A witness who has been examined in behalf of the State on the trial of an indictment against three defendants for grand larceny, to show a common design and confederacy among them, may also testify to the same facts on a subsequent trial of two of the defendants on an indictment for obtaining money under false pretences, from the same person, at a different time and place.—*The State* v. *Davis & Ferguson*, 13

CRIMINAL LAW—CONTINUED.

5. An indictment for larceny of "Bank notes," *eo nomine*, which states their number, denomination and value, is sufficient.—*The State* v. *Williams et als.*, 15

6. When the record contains no bill of exceptions, but only an agreement purporting to have been made between the Solicitor and the counsel for the defendant, that the bill of exceptions taken in another case should be regarded as having been taken in the case at bar, and the minute entry does not show that the agreement was acknowledged by the parties in the Circuit Court, or made part of the record by an order of that court, the appellate court will reject the agreement.—*Cobb* v. *The State*, 18

7. A verbal permission from the owner of a slave to sell "dry goods" to the slave, is too general and indefinite. The permission, whether verbal or in writing, should specify the articles to be sold.

[DARGAN, C. J., *dissenting*, held that the term "dry goods" was sufficiently definite]—*Hurt* v. *The State*, 19

8. An indictment for an assault with intent to murder, must state the facts which constitute the assault.—*Trexler* v. *The State*, 21

9. In an indictment for perjury, which charges the defendant with having taken a false oath to procure his discharge from custody under a writ of *ca. sa.*, an assignment which alleges that at the time when he took the oath, he had moneys whereby to satisfy the debt for which he was arrested, is sufficient.—*De Bernie* v. *The State*, 23

10. An indictment for perjury is not vitiated because some of the assignments are bad, and proof of any one assignment that is good is sufficient. *Ib.*

11. The penalty of perjury as prescribed by the Act of 1839, [Clay's Dig. p. 71, § 4,] is changed by the subsequent Act of 1841, [Clay's Dig., p. 427, § 2.] *Ib.*

12. An indictment is defective which does not state *the time* when the offence was committed, and a demurrer to it on that ground should be sustained.—*Roberts* v. *The State*, 526

13. A room in the second story of a two-story house, which is accessible only by means of a flight of steps leading up to it on the outside, and which is used by one of the proprietors of the house as a sleeping apartment, the lower room being used by the proprietors for retailing spirituous liquors, is within the prohibition of the statute against gaming at any store-house for retailing spirituous liquors, or house or place where spirituous liquors are retailed or given away.—*Johnson* v. *The State*, 527

14. An indictment for playing cards "at a public place" is sufficiently definite.—*Roquemore* v. *State*, 528

15. A back room occupied by the Register in Chancery as a bed-room, adjoining the front room, which was his office, and communicating with it by a door, is not a public place within the statute against gaming, it being shown that the house was surrounded in the rear by a high fence; that the playing took place at night, when the doors were locked and the windows closed; that the persons present,

CRIMINAL LAW—CONTINUED.

about eight in number, came by invitation from the occupier of the room, and that they entered through the back door, and not through the public office. *Ib.*

16. In an indictment for camp-hunting, under the act of February 5, 1846, (Pamphlet Acts, p. 134,) a count which only charges the defendants with having formed themselves into a company consisting of more than five for the purpose of camp-hunting, is fatally defective.—*Underwood et als.* v. *The State*, 532

17. A count which charges that the defendants came into the county of Covington for the purpose of camp-hunting, and that they did camp-hunt therein, but does not allege that they hunted together, or in a company of more than five persons, is also fatally defective. *Ib.*

18. The Act of February 5, 1846, does not prevent citizens of other counties from camp-hunting in the county of Covington, except in companies consisting of more than five persons. *Ib.*

19. The Act of February 7, 1850, [Pamphlet Acts, 51,] renders it unnecessary in a prosecution for trading with a slave to aver in the indictment, or to prove who was the master, owner or overseer of such slave, or to negative his assent to such trading.—*Hirschfelder* v. *The State*, 534

20. The Act of February 7, 1850, which dispenses with the necessity of certain averments in an indictment for trading with a slave, is not unconstitutional. *Ib.*

21. Permission from the owner or master, to sell goods to his slave, not expressing the articles to be sold, is not such a consent as the statute requires, and furnishes no protection to the defendant. *Ib.*

22. The City Court of Mobile has power to originate criminal proceedings at a special term.—*Nugent* v. *The State*, 540

23. An objection to the Grand Jury by which an indictment is found, can only be taken by plea in abatement. *Ib.*

3. An indictment which alleges "that J. N., late of said county, in and upon one H. S., (she, the said H. S. then and there being a female child under the age of ten years,) feloniously did make an assault, and her, the said H. S. then and there feloniously did abuse in the attempt carnally know," is fatally defective in not specifying with sufficient certainty and precision the person upon whom the attempt was committed. *Ib.*

25. An indictment for an assault with intent to murder contained two counts. The judgment entry recites that "the State moved that the defendant be tried on the first count in the indictment, and that the second count be postponed until the first is disposed of, to which there was no dissent by the defendant." On the trial upon the first count, the jury found the defendant "guilty as charged in the bill of indictment," and the solicitor afterwards entered a *nolle prosequi* to the second count. *It was held*,

1. That the postponing of the second count until the first was disposed of, was an error for which the judgment of conviction must be reversed.

CRIMINAL LAW--CONTINUED.

2. That the defendant is not precluded from taking advantage of the error, by the recital in the judgment entry that he did not dissent from such a course of proceeding.
3. That if the defendant had consented to go to trial on one count only, yet the verdict being general, would be erroneous.
4. That the appellate court will not say, that the defendant was not injured by the error, because a *nolle prosequi* was afterwards entered to the second count.--*Flanagan* v. *The State*, 546

26. An indictment for playing cards "at a public place" is good.--*Flake* v. *The State*, 551
27. An infirmary is a public place within the statute against gaming. *Ib.*
28. In an indictment for permitting a gaming table to be exhibited and carried on in a house occupied by the defendant, it is not necessary to aver that the defendant does not come within the proviso of the statute, (Clay's Dig., 434, § 16.)—*Clark* v. *The State*, 552
29. When a new offence is created by statute, an indictment which describes the offence in the language of the statute is sufficient. *Ib.*
30. An indictment under the statute against permitting gaming tables to be exhibited, need not allege the name of the person by whom the table was exhibited, nor that his name was unknown. *Ib.*
31. On the trial of an indictment for murder, the defendant cannot prove threats made by the deceased against him, without also proving that such threats came to his knowledge before the killing.--*Powell* v. *The State*, 577
32. When a prisoner is committed for an assault with intent to kill and murder, and it is shown that the person wounded is in danger of dying before the expiration of a year and a day from the time the wound was inflicted, the prisoner is not entitled to bail, as a matter of right, because no indictment has been found against him although two terms of the court at which he might have been indicted have elapsed since his commitment, unless it is also shown that he would be entitled to bail if death should ensue within the year and day.----*Ex parte Andrews & Wife*, 582
33. An affidavit made for the purpose of procuring the arrest of the party accused, which charges that "the said S. has feloniously taken, stolen and carried away from the possession of C., where she was placed by affiant, a negro woman named Eliza. valued at $450, and that she is now in the possession of the said S." is sufficiently descriptive of an offence against the criminal laws of the country to justify the magistrate in causing the party accused to be apprehended and brought before him.----*Ewing* v. *Sanford*, 605

DAMAGES.

1. In assessing the damages occasioned by the construction of a Railroad to a person through whose lands the road passes, a witness cannot state his opinion, as to the amount of damages sustained.—*Montgomery & West Point R. R. Company* v. *Varner*, 185

DAMAGES--CONTINUED.

2. When the purchaser of a slave sold at public auction pays the purchase money after he has been informed of the slave's unsoundness, and of facts which would constitute a fraud in the sale, he cannot afterwards recover damages in an action of deceit, on account of such unsoundness.—*Gilmer* v. *Ware*, 252
3. An action does not lie to recover damages for the malicious act of the defendant in suing out an injunction against the plaintiff, until the injunction is finally disposed of, or until the suit in which it was sued out is terminated.—*Tatum & Smith* v. *Morris*, 302
4. An action of debt on an injunction bond cannot be maintained to recover damages occasioned by the suing out of the writ, unless the injunction was sued out vexatiously.—*Garrett & Hill* v. *Logan*, 344
5. An action may be maintained on an injunction bond without a previous action on the case to ascertain the damages occasioned by the vexatious suing out of the writ. *Ib.*
6. Counsel fees necessarily incurred, in the defence of an injunction suit, may be recovered in an action of debt on the bond, though they may not be actually paid. *Ib.*
7. The Judge of Probate has jurisdiction to grant writs of *ad quod damnum* in those cases in which the Judge of the County Court had authority to grant them before the abolition of the County Court.—*Stein* v. *Burden*, 715
8. *It seems*, that the measure of damages in an action on a bond for titles is the value of the land at the time of the breach.—*Whiteside* v. *Jennings*, 784

DEBT, ACTION OF.

1. Neither commissioners who are appointed to make distribution of an estate, nor the Orphans' Court, have authority or jurisdiction to require one distributee to pay a sum of money to another, and such a decree, whether made by the commissioners only, or confirmed by the Orphans' Court, will not sustain an action of debt for the recovery of the money.—*Allen & Wife* v. *Raney & Wife*, 68
2. But if the parties adopted the division, with its terms, as made by the commissioners, and acted on it, or made distribution among themselves upon the same terms, they would be bound by it. *Ib.*
3. In debt on bond, the breaches assigned, whether in the declaration or by a replication, must show that the plaintiff has a cause of action.—*Garrett & Hill* v. *Logan*, 344
4. An action of debt on an injunction bond cannot be maintained to recover damages occasioned by the suing out of the writ, unless the injunction was sued out vexatiously. *Ib.*
5. An action may be maintained on an injunction bond without a previous action on the case to ascertain the damages occasioned by the vexatious suing out of the writ. *Ib.*
6. Counsel fees necessarily incurred, in the defence of an injunction suit, may be recovered in an action on the bond, though they may not be actually paid. *Ib.*

DEBT, ACTION OF—CONTINUED.

7. In an action of debt against a sheriff and his sureties, for a failure on the part of the sheriff to collect and pay over militia fines, the declaration must set forth the names of the persons against whom the fines were assessed, and the several amounts of the fines, as stated in the certificate of the President of the Court Martial.—*Chapman, Gov'r, &c.* v. *Weaver et als.* 626

8. When the official bond of a county treasurer is defective as a statutory bond, but good as a common law bond, suit can only be brought upon it in the name of the obligee.—*Wilson, use &c.* v. *Cantrell et als.* 642

9. An official bond of a county treasurer, the condition of which is in the precise words and form prescribed by the Act of 1839, (Clay's Dig. 577, § 11,) and refers specially to the act by virtue of which the bond was executed, and on which is endorsed the oath prescribed by the act, subscribed by the treasurer, is a good statutory bond, although it does not recite that the principal obligor is the county treasurer, or that he was elected as such. *Ib.*

10. In an action of debt against a county treasurer and his sureties on his official bond, a recovery can only be had for injuries necessarily affecting the rights of the party for whose use the suit is brought. *Ib.*

11. In debt on bond, a demurrer will not lie to a whole count which assigns several breaches, some of which are good. *Ib.*

12. An action of debt on a bond payable to the Governor for the time being and his successors in office cannot be maintained in the name of the obligee, as Governor, after he has gone out of office, unless the suit is brought for the use of a third person who may be responsible for the costs and entitled to the recovery.—*Chaudron* v. *Fitzpatrick, Gov'r, &c.* 649

See CONSTRUCTION, 2.

DEBTOR AND CREDITOR.

1. When a debtor becomes insolvent, and executes a deed of trust to secure certain of his creditors, a court of chancery will make a *pro rata* distribution of the proceeds among all the creditors who are provided for, when the deed creates no preference among them.—*Br. Bank at Mobile* v. *Robertson et als.* 798

2. A creditor is entitled to the benefit of all pledges and securities which the principal debtor places in the hands of his surety to be applied to the payment of the debt. *Ib.*

DEEDS—THEIR REGISTRATION, &c.

1. An instrument founded on a valuable consideration, in form a deed executed by both parties, and as such capable of full effect, and manifestly intended to convey a beneficial interest to the grantee, to take effect and be enjoyed in the grantor's life-time, must be regarded as a deed, and not as a will.—*Thompson et als.* v. *Johnson,* 59

2. The same instrument cannot operate both as a deed and as a will. *Ib.*

3. An assignment of accounts to be created in future vests an equitable interest in the assignee, which will be protected in a court of

DEEDS—THEIR REGISTRATION, &c.—CONTINUED.
law, when sued upon in the name of the assignor for the use of the assignee, but not as against a debtor who without notice of the assignment has acquired a legal set-off.—*Stewart* v. *Kirkland*, 162
4. When accounts to be created in future are conveyed by deed of trust, together with certain other personal property, the registration of the deed is not *constructive* notice of the assignment of the accounts. To prevent a set-off against them, the defendant must be charged with *actual* notice of their assignment. *Ib.*
5. The deed of a sheriff or marshal cannot be collaterally impeached on account of any irregularities in his proceedings, or in the process under which he sold the land.—*Pollard* v. *Cocke*, 188
6. If a deed is not registered within the six months prescribed by the statute, nor until after the rendition of a judgment against the vendor in favor of a creditor who had no notice of the deed, its subsequent registration cannot relate back so as to defeat or postpone the lien of the judgment. *Ib.*
7. The statute which requires the registration of deeds within six months after their execution, applies to the deeds of sheriffs and marshals. *Ib.*
8. The statute of frauds of this State does not apply to property brought into the State by a tenant for life holding under a deed or will executed beyond the State, although the tenant for life and the remaindermen resided in this State, at the time of the execution of the deed, or probate of the will, and continue to reside here.—*Turner* v. *Fenner et als.* 355
9. A party whose title to land situated within the territory of Louisiana was complete by grant from the Crown of Spain while that power held dominion over the country, may successfully assert his title against any claimant under the United States Government, if the grant has not been rendered inoperative as an instrument of evidence by his failure to exhibit it for registration as required by the act of Congress.—*Hall et als.* v. *Doe ex dem. Root*, 378
10. A title to land situate within the territory of Louisiana, derived from the Spanish Government, the written evidence of which was never presented to the United States Commissioners, nor recorded under any of the different acts of Congress, cannot be received in evidence against any grant derived from the United States. *Ib.*
11. When the purchaser of land files a bill seeking to be relieved against the payment of a part of the purchase money on the ground of a deficiency in the quantity of land, and does not allege in his bill that there was any fraud or mistake in the execution of the deed, or that any language not truly expressive of the contract had been inserted therein, or any part of the contract omitted, the deed of conveyance must be taken as conclusive evidence of the terms of the contract.—*Frederick* v. *Youngblood*, 680
12. The words, "be the same more or less," when used in a deed in stating the quantity of land conveyed by it, mean that the parties shall run the risk of gain or loss, and that if the quantity prove greater

DEEDS---THEIR REGISTRATION, &c.—CONTINUED.

or less than that stated, they shall nevertheless abide by their bargain. *Ib.*

13. The statutes of this State requiring the registration of mortgages, deeds of trust, &c. on personal property, do not apply to vessels for the navigation of the ocean. The evidence of title in them is to be looked for in their ship papers and registration according to the acts of Congress.—*Fontaine & Dent* v. *Beers & Smith*, 723

14. A deed of mortgage may properly be admitted of record, on proof by the subscribing witness that he saw the same signed, sealed and delivered on the fourth day after its date. When it is not shown that any fraud was intended, nor that any injury was done, or attempted, by the wrong date, the probate will be held a substantial compliance with the statute, although it does not strictly accord with the form prescribed by it.—*Harbinson et als* v. *Harrell et als.* 753

DETINUE.

1. Detinue may be maintained for the recovery of a slave who at the commencement of the suit was in the possession of a third person on hire, it not being shown that the hiring is of such a nature as would prevent the defendant from resuming the possession at pleasure.—*Gaines* v. *Harvin*, .. 491

DIVORCE.

1. A divorce will not be granted for cruel, barbarous and inhuman treatment, unless there has been either actual violence committed, attended with danger to life, limb or health, or a reasonable apprehension of such violence.—*Hughes* v. *Hughes*, 307

2. Proof that the defendant was habitually intoxicated, that when drunk, he was a quarrelsome, turbulent, dangerous man, that he had used profane and abusive language towards his wife, threatening to inflict personal violence upon her, that he had endeavored to execute his threats by chasing her through the house and yard, and attempting to strike her with a chair, and that he had on one occasion inflicted personal violence upon her by kicking her, establishes a case of legal cruelty, sufficient to entitle the wife to a divorce. *Ib.*

3. A bill which charges the defendant's habitual intoxication, and his violence resulting therefrom as evidenced by his threats and abuse, "that he used the most gross and abusive language toward complainant, cursing her, and compelling her through fear of his violence to seek safety in quitting his presence, that he made threats of personal violence, such as would endanger her personal safety, as well as her life and limbs," and specifies particular instances of his misconduct, substantially alleges sufficient to entitle the complainant to the relief prayed, and puts the defendant in possession of the charges to be proved against him. *Ib.*

4. Acts of cruelty committed after a reconciliation revive the former cruelty, condonation being always conditional. *Ib.*

5. In suits for divorce, a sworn answer denying the allegations of the bill does not impose upon the complainant the necessity of establishing her case by two witnesses, or one witness with corroborating

DIVORCE---CONTINUED.

circumstances. The statute [Clay's Dig. 170, § 6,] merely contemplates a formal denial of the allegations of the bill, and does not require a sworn answer. *Ib.*

6. A bill for a divorce *a vinculo matrimonii*, which alleges cruelty, abandonment and adultery on the part of the defendant, is not multifarious.—*Quarles* v. *Quarles*, 363

7. When a divorce *a vinculo matrimonii* is decreed in favor of the wife, it is error to decree alimony to her, instead of a division of the estate between the parties, (Clay's Dig. 179, § 8.) *Ib.*

8. A proposal made by the wife, but rejected by the husband, to return to his house, from which she has been driven by his cruel treatment, cannot be construed into a condonation of his cruelty. *Ib.*

9. The law of the place of the parties' actual domicil must govern in all questions of divorce, without regard to the law of the place where the marriage was celebrated.—*Harrison* v. *Harrison et als.* 499

10. A decree of divorce regularly rendered by the proper tribunal in this State is not invalid because the laws of the State in which the marriage was celebrated do not allow a divorce *a vinculo matrimonii.* *Ib.*

11. A decree of divorce against a non-resident defendant, upon whom service has been perfected by publication in the manner prescribed by the statute, is equally as obligatory upon the defendant as if he had been personally served with process, or had appeared and answered the bill. *Ib.*

12. When a wife abandons her husband in this State and removes to another State, and after the expiration of three years he files a bill against her for divorce, he may proceed against her as an absent defendant, although she has not resided in this State during the three years. The desertion with intention of abandonment, which is the cause of complaint, having originated here, it is immaterial where the defendant resides during the three years subsequent thereto. *Ib.*

13. A decree of divorce does not become ineffectual because the act of the Legislature confirming it is not passed at the first General Assembly of the State held after its rendition. *Ib.*

14. Nor will the decree be pronounced fraudulent in a subsequent proceeding in which it is collaterally attacked, on account of a misnomer of the defendant in the insertion of a letter as the initial of a middle name, the description being otherwise sufficiently accurate, and there being no allegations in the pleadings of such subsequent suit that she was not known or called by such name. *Ib.*

15. Nor will the decree be considered void for fraud when collaterally impeached, because the bill omitted to state a fact which would have been a bar to the relief sought. *Ib.*

16. Adultery committed by the wife when insane is no ground for a divorce on the application of the husband.--*Wray* v. *Wray*, 522

DOWER.

1. If a widow, before her dower is allotted to her, convey her interest in the lands of her deceased husband, the heir at law may recover in ejectment against her alienee.--*Wallace* v. *Hall's Heirs*, 367

EJECTMENT.

1. When both plaintiff and defendant in an action of ejectment claim under purchases at sheriff's sales under executions against the same person, the plaintiff is not bound to prove the nature or quality of that person's title; it is sufficient if he can establish it in himself.—*Pollard* v. *Cocke*, 188

2. One who is in the possession of land before the rendition of a judgment under which it is afterwards sold, may protect himself against the purchaser at the sheriff's sale, by showing his own possession and an unregistered deed executed by the judgment debtor prior to the rendition of the judgment, although he does not connect himself in any manner with the deed, nor show that he claims under it.—*Strickland* v. *Nance*, 233

3. If a widow, before her dower is allotted to her, convey her interest in the lands of her deceased husband, the heir at law may recover in ejectment against her alienee.—*Wallace* v. *Hall's Heirs*, 367

4. A party whose title to land situated within the territory of Louisiana was complete by grant from the Crown of Spain while that power held dominion over the country, may successfully assert his title against any claimant under the United States Government, if the grant has not been rendered inoperative as an instrument of evidence by his failure to exhibit it for registration as required by the act of Congress.—*Hall et als.* v. *Doe ex dem. Root*, 378

5. In respect to incomplete titles, if a claim was such as would have bound the conscience of the former sovereign to perfect the title, and furnish the evidence necessary to support and maintain it, the United States Government having acquired the territory would take it charged with the duty of carrying out in good faith the obligation of the previous Government existing at the time of the cession. *Ib.*

6. But when an incomplete title is perfected either by act of Congress or by patent, the United States, and not the previous Government, must be regarded as the source of title. *Ib.*

7. When a party claiming land in the ceded territory is obliged to appeal to the political power of the United States Government in order to perfect his title, or to obtain the evidence of title, that Government has a right to prescribe the terms or conditions upon which such confirmation or recognition will be made; provided those terms or conditions are not inconsistent with the performance of the duties and the faithful discharge of the obligations imposed upon it by the transfer of the ceded territory. *Ib.*

8. When two claims to the same land are confirmed by the United States Government, the parties are remitted to their rights derived from the former Government, the effect of the confirmation being to place each party *in equali jure*, so far as the action of the Government is concerned. *Ib.*

9. A title to land situate within the territory of Louisiana, derived from the Spanish Government, the written evidence of which was never presented to the United States Commissioners, nor recorded under any of the different acts of Congress, cannot be received in evidence against any grant derived from the United States. *Ib.*

EJECTMENT—CONTINUED.

10. But the unrecorded evidence of such title, and the mesne conveyances connecting the defendant therewith, would be admissible to show an adverse possession under color of title, so as to protect the party in possession under the statute of limitations. *Ib.*

11. A claim founded on an alleged Spanish grant, (the written evidence of which grant has been lost by time or accident,) which has never been confirmed by act of Congress, cannot defeat an action of ejectment, by one whose claim, founded on a Spanish concession, was presented to the United States Commissioner, reported for confirmation by him, confirmed by the act of Congress of 1822, located and surveyed under the warrant of the Register and Receiver, and consummated by patent from the United States. *Ib.*

12. A claim to land within the Territory of Louisiana, which the Commissioner reports to Congress as having been formerly inhabited and cultivated, but does not say that such inhabitation and cultivation was under the Spanish Government, cannot be considered as having been recommended by him for confirmation.—*Ib.* 379

13. A plaintiff shows a sufficient title to maintain an action of ejectment, by showing that the original claim upon which his title is founded was presented to the United States Commissioner, reported by him for confirmation, confirmed by the act of Congress of 1822, located and surveyed under the warrant of the Register and Receiver, and consummated by patent from the United States Government. *Ib.*

14. When a claimant of lands situated within the Territory of Louisiana has appeared before the commissioner appointed under the authority of the Act of Congress of April 12, 1812, and presented his petition claiming title by grant from the Spanish Government, but produced no written evidence of title, the petition alleging that the same had been lost or carried away by the Spanish authorities, and the commissioner reports favorably to his claim, which is afterwards confirmed by the Act of Congress of May 8, 1822, the title of the claimant is founded upon the report of the commissioner and the Act of Congress confirmatory thereof, and not upon any supposed Spanish grant.—*Doe ex dem. Chastang* v. *Dill,* 421

15. When the plaintiff in ejectment proves that the ancestor of his lessors appeared before the United States commissioner and presented his claim to certain lands within the Territory of Louisiana, embracing the lands in controversy, that the commissioner reported favorably to his claim, that it was afterwards confirmed by the Act of Congress of May 8, 1822, and that the register and receiver, under the authority of the act, afterwards issued a certificate of confirmation to him, he shows sufficient evidence of a legal title to support the action of ejectment. *Ib.*

16. Under the statutes and rules of court regulating the action of ejectment in this State, a plaintiff may proceed for his costs and damages, after the premises have been recovered against him by an adversary plaintiff in another suit; consequently a plea *puis darrein continuance* of a recovery by a stranger is demurrable, if pleaded to

EJECTMENT—CONTINUED.

the whole action, because it is no defence to the recovery of damages.—*Doe ex dem. Kennedy* v. *Holman & Howard*, 734

17. But a plea of a recovery by a stranger *puis darrein continuance* is no bar to a recovery of the premises; for the defendant, if not estopped from denying the plaintiff's title by some peculiar relation existing between them, may protect himself against a recovery by showing a superior outstanding title in a stranger; and if the plaintiff's title is superior, he ought not to be prevented from recovering against the defendant by reason of a recovery of the premises by one who would in turn become liable to him for damages upon entering into possession. *Ib.*

ELECTION.

1. The mere recovery of a judgment against one of several joint trespassers will not preclude the plaintiff from proceeding to judgment against the others.—*Blann* v. *Crocheron*, 647
2. Whether suing out execution on his judgment will be a bar to a subsubsequent suit against the others—QUERE? *Ib.*
3. Those who will be entitled to the money arising from the sale of property may, if they are capable of making an election, elect to take the property itself in lieu of the money.—*Broome et als.* v. *Curry's Adm'rs*, 805

ERROR.

1. A writ of error does not lie to revise the action of the Circuit Court in cases of appeal from the order of a Justice of the Peace, or other officer, requiring a party to find sureties to keep the peace.—*Tomlin et als.* v. *The State*, 9
2. If a writ issue against three defendants, which is served upon two of them only, and an *alias* is issued and served upon all, it is erroneous to render judgment by default against all of them, at the term to which the *alias* writ is returnable.—*Griffin, Rayfield & Griffin* v. *Wilson*, 27
3. In such case, a writ of error is properly sued out in the name of all the defendants, and all may join in the assignment of errors. *Ib.*
4. The plaintiff in error, by showing a verdict for the defendant upon insufficient pleas, shows an error *prima facie* prejudicial to him, and it is the duty of the defendant to make the record affirmatively show that no injury resulted from the error, if such was the case.—*Kirksey, trustee, &c.* v. *Dubose*, 44
5. The appellate court will not reverse on account of an error, when the record clearly shows that no injury resulted from it to the plaintiff in error.

(CHILTON, J., dissenting, held that the appellate court should reverse in favor of a party, against whom the court below has improperly overruled a demurrer to the declaration, although it may appear from the evidence set out in the record, that the plaintiff was entitled to recover under counts which are unobjectionable.)—*Smith & Garey* v. *Awbrey*, 63

6. When the interest of an absent defendant is affected by the decree,

ERROR—CONTINUED.

and he has not been personally served with process of *subpœna* within this State, nor voluntarily submitted to the jurisdiction of the court, it is erroneous to render a final decree without the bond required by the act of 1805.—(Clay's Dig. 353, § 45.)—*Beavers et als.* v. *Davis*, 82

7. It is erroneous to render judgment by default, before a declaration has been filed.---*Amason* v. *Nash et al.* 104

8. In a proceeding under the statute before the Orphans' Court, to compel the administrator of a deceased vendor to make title to land, which had been sold by the deceased, and for which he had executed his title-bond, the administrator is the only *indispensable* party defendant to the petition, and he may sue out a writ of error alone to reverse a decree rendered against him.---*Prince, adm'r*, v. *Bates*, 105

9. A mistake in the given name of a party against whom a decree has been rendered, when the true name appears in the record, is a clerical misprision, and will be corrected in the appellate court, at the cost of the plaintiff in error.---*McBroom's Adm'rs* v. *McBroom's Cred's*, 173

10. When a cause has been transferred to the Circuit Court, under the Act of February 11, 1850, (Pamphlet Acts, p. 34,) after the appearance term of the County Court, it is not erroneous to enter judgment by default at the first succeeding term of the Circuit Court.---*Falk & Rosenthal* v. *Reese, use &c.* 240

11. The omission of an indispensable party is an error for which a decree may be reversed, although the objection is taken for the first time in the appellate court.---*Gould* v. *Hayes et al.* 439

12. The refusal of a Judge of Probate to admit a person claiming to be a creditor of an insolvent estate, to renew the litigation after a final judgment rejecting his claim, is not such a judgment as will authorize a writ of error.---*Saltmarsh* v. *Bird, Adm'r*, 665

13. When the judge, by consent of the parties, is substituted in lieu of a jury to try the facts of a case, his decision cannot be revised by the appellate court.---*Barnes* v. *The Mayor & Alder. of Mobile*, 707

14. In an admiralty proceeding by libel against a steamboat, after the vessel has been sold under an order of court, and the proceeds of the sale brought into court for distribution, the refusal of the court to order the proceeds to be paid to the claimant of the boat is not such a final judgment as will authorize an appeal or writ of error.---*Stewart George* v. *Saunders et als.* 744

15. When the petition, upon which a sale of lands belonging to a decedent was decreed by the Orphans' Court, is lost, and the record shows that the grounds upon which the sale was decreed were, that the estate was solvent, and that it would be of infinite benefit to the heirs to sell the land, a petition alleging the additional ground that the land could not be equally, fairly and beneficially divided among the heirs at law, cannot be substituted for that which is lost.---*Bishop's Heirs* v. *Hampton*, 792

16. The order of the Orphans' Court, allowing the substitution of the petition in such a case, is such a final judgment or decree as will support a writ of error. *Ib.*

17. The parties to the motion in the court below are the proper parties to the writ of error, the plaintiff being one who claims under the purchaser at the sale, and the defendants the heirs at law of the decedent. *Ib.*

See APPELLATE COURT, 4, 7, 8, 9, 10.

ESTATES OF DECEASED PERSONS.

1. Neither commissioners who are appointed to make distribution of an estate, nor the Orphans' Court, have authority or jurisdiction to require one distributee to pay a sum of money to another, and such a decree, whether made by the commissioners only, or confirmed by the Orphans' Court, will not sustain an action of debt for the recovery of the money.—*Allen & Wife* v. *Raney & Wife*, 68
2. But if the parties adopted the division, with its terms, as made by the commissioners, and acted on it, or made distribution among themselves upon the same terms, they would be bound by it. *Ib.*
3. When the settlement of an insolvent estate is pending in the Chancery Court, and a final decree has been rendered in favor of the creditors against the administrators, and a balance is found in the hands of the administrators after satisfying all claims against the estate, a distributee of the estate may propound his interest to the court by petition, praying to be made a party to the cause, and for a decree against the administrators in his favor, for his distributive share of the balance in their hands to be distributed.---*Purdom & McBroom, Adm'rs*, v. *McBroom*, 110
4. But it is erroneous to render a final decree, in such a case, in favor of a distributee, against the administrators, without giving them notice of the filing of the petition, and thus allowing them an opportunity to contest the petitioner's claim.---*Ib.* 111
5. When a sale of real estate is ordered by the Orphans' Court on the petition of an administrator, under the Act of 1822 (Clay's Digest, 224-5,) the commissioners who are appointed to make the sale have no power to execute a conveyance to the purchaser, until a final decree has been rendered confirming their report of the sale, and directing them to convey title to the purchaser; and their deed without such final decree does not divest the title of the heirs at law.---*Wallace* v. *Hall's Heirs*, 367
6. Prior to the Act of 1846 a suit might be maintained by the distributees of an estate against the executor after his removal from office, to make him account for the assets that had come to his hands.—*Gould* v. *Hayes et al.* 438
7. The distributees or next of kin can maintain no suit either at law or in equity, for the mere purpose of distribution, until letters of administration have been granted on the estate of the decedent.-- *Gardner et al.* v. *Gantt et al.* 666
8. A bond for titles, executed by commissioners who are appointed by the Orphans' Court to sell the real estate belonging to a decedent, conditioned that the commissioners shall make or cause to be made to the obligee a fee simple title to the land, is binding upon the obli-

ERROR—CONTINUED.

gors personally, when they exceed their authority and fail to bind the decedent's estate.—*Whiteside* v. *Jennings*, 784

See PARTNERSHIP, 1, 2, 3, 4, 5.

ESTOPPEL.

1. Admissions which have been acted on by others are conclusive against the party making them, in all cases between him and the person whose conduct he has influenced. It is immaterial whether the admission be true or false, whether expressly made or only to be inferred from the conduct of the party, it being the fact that another person has been misled by it, that renders it conclusive.—*McCravey, Ex'r*, v. *Remson*, 430
2. A person claiming title under one who is estopped is also bound by the estoppel, unless it is fraudulent.—*Ib.* 431
3. When the complainant's conduct has not been the basis of the acts of the person through whom the defendant claims, and his silence has not misled any one, he will not be held to have forfeited his equitable rights by the mere failure or omission to assert them.—*Brewer* v. *Brewer & Logan*, 482

EVIDENCE.

1. A witness who has been examined in behalf of the State on the trial of an indictment against three defendants for grand larceny, to show a common design and confederacy among them, may also testify to the same facts on a subsequent trial of two of the defendants on an indictment for obtaining money under false pretences, from the same person, at a different time and place.—*The State* v. *Davis & Ferguson*, 13
2. A witness who deposes to the declarations or admissions of a party, must give the precise language used by him, if he can, or at least the substance of what he said.—*Dennis & Strickland* v. *Chapman, Governor, &c.*, 29
3. The admissions of an officer are not evidence against his securities, unless they are made while in the performance of some official act or duty, connected with the transaction, out of which the breach of the condition of his bond is alleged to have arisen. *Ib.*
4. The declaration of a party while in possession of a slave, "that she was his negro, and that he intended to keep her," is admissible in evidence, as part of the *res gestæ*, to prove the character of his possession.—*Nelson* v. *Iverson*, 95
5. The statement of a witness, that a person was in the habit of exercising control over a slave, is admissible. If the expression is objectionable, as being too general and indefinite, the opposite party should require an explanation of it from the witness. *Ib.*
6. The declarations of the mother of an infant, while she has the possession of a slave, which she holds as guardian or bailee for her infant son, cannot be received in evidence to defeat his rights. Yet if she claims the slave as his property, asserting his title in an open notorious manner, as adverse to the claim of every one else, it would

EVIDENCE—CONTINUED.

be admissible to prove, by her acts and declarations contemporaneous with her possession and tending to show its character, that she held the slave as the property of another, and not for her son *Ib.*

7. In assessing the damages occasioned by the construction of a Railroad to a person through whose lands the road passes, a witness cannot state his opinion, as to the amount of damages sustained.—*Montgomery & West Point R. R. Company* v. *Varner*, 185

8. Parol evidence is admissible to show that a written instrument is altogether void, or that it never had any binding efficacy, or that the consideration has failed either in whole or in part.—*Corbin* v. *Sistrunk*, 203

9. Parol evidence is inadmissible to prove an execution, unless its loss or destruction is first proved, or its absence accounted for, or a transcript of the record containing it produced.—*Smelser* v. *Diane*, 245

10. When issue is taken upon the facts stated in a petition for a *supersedeas*, neither the affidavits of the parties nor the depositions of incompetent witnesses are admissible.—*Bower et al* v. *Saltmarsh*, 274

11. A memorandum made by a justice of the peace at the time of the trial of a prosecution before him, showing the judgment which he rendered in the cause, is admissible evidence in a subsequent action instituted by the defendant against the prosecutor, to show the termination of the prosecution.—*Long* v. *Rogers*, 321

12. When the evidence which is objected to by the plaintiff in error is not set out in the bill of exceptions, the appellate court will presume in favor of the correctness of the judgment that the evidence was admissible.—*Ib.*, 322

13. The record of the chancery suit in which the injunction was sued out is admissible, but not conclusive evidence, as to the vexatious suing out of the writ.—*Garrett & Hill* v. *Logan*, 344

14. The rule is inflexible, that if a written instrument is perfect and complete of itself, parol evidence cannot be received to add another term to it or to change its legal effect.—*West & West* v. *Kelly's Ex'rs*, 353

15. If it is apparent, however, that the written instrument contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract. *Ib.*

16. But the parts of the agreement proposed to be proved by parol must not be inconsistent with, or repugnant to the intention of the parties as shown by the written instrument. *Ib.*

17. In assumpsit on a promissory note purporting to be given for professional services to be rendered in future by the payees as attorneys at law, but payable at a day certain, parol proof is inadmissible to show that it was the agreement of the parties, that the note should not be paid unless the payees were successful in the suit for the bringing of which it was given. *Ib.*

18. The court is not bound to separate legal from illegal evidence when both are offered together, but the whole may be rejected. *Ib.*

19. A title to land situate within the territory of Louisiana, derived from the Spanish Government, the written evidence of which was

EVIDENCE—CONTINUED.

never presented to the United States Commissioners, nor recorded under any of the different acts of Congress, cannot be received in evidence against any grant derived from the United States.—*Hall et als.* v. *Doe ex dem. Root*, 378

20. But the unrecorded evidence of such title, and the mesne conveyances connecting the defendant therewith, would be admissible to show an adverse possession under color of title, so as to protect the party in possession under the statute of limitations. *Ib.*

21. A record is not evidence of any fact which can only be inferred from it by argument.—*McCravey, Ex'r.* v. *Remson*, 430

22. Declarations or admissions against the interest of the party making them, that he holds as tenant or trustee for another, are admissible against him and those who succeed to his rights or estate.—*Brewer* v. *Brewer & Logan*, 481

23. In an action for maliciously suing out an attachment, evidence that another attachment against the plaintiff was in the hands of the sheriff and was levied on the same property at the same time that the defendant's was levied, is inadmissible for the defendant.—*Yarbrough* v. *Hudson*, 653

24. But the defendant may prove the issuance of another attachment and notice thereof to himself previous to the issuance of his own attachment, as tending to rebut the presumption of malice. *Ib.*

25. A deed of trust executed by the plaintiff prior to the issuance of the attachment is admissible evidence for the defendant in such an action; and also any proof tending to show that it was fraudulent; or that it was part of a plan to enable the plaintiff to dispose of his property fraudulently; or that he was in embarrassed circumstances at the time of its execution; or that the property conveyed by it was subsequently run off by the beneficiary to another State. *Ib.*

26. The contents of a bill of sale cannot be proved by parol until the instrument itself is produced, or its absence accounted for. *Ib.*

27. The authority of the son to bind his father by the purchase of goods beng established, the declarations of the son respecting the subject matter are also admissible evidence against the father, if made at the time of the purchase and constituting a part of the *res gestæ*.—*McKenzie* v. *Stevens*, 691

28. On a demurrer to evidence the court must assume as true every fact which a jury could, with any propriety according to the evidence, find to be true.—*Holman* v. *Whiting*, 703

29. A bill of exchange drawn by "Ebenezer Hearn" may be given in evidence under a declaration on a bill alleged to have been drawn by "Ebenezer Hearne."—*Coster, Robinson & Co.* v. *Thomason, use, &c.*, 717

30. A statement by a witness "that the habits of business and intimacy between himself and the defendant were such that witness had no doubt if said defendant had received notice of protest of said bill, it would at once have been communicated to witness," is inadmissible evidence for the defendant in a suit on the bill, being a mere expres-

EVIDENCE--CONTINUED.

sion of opinion, and not the statement of a fact within the knowledge of the witness. *Ib.*

31. A recital in the notary's certificate of protest, that "notice of the protest had been left at the offices of the endorsers," is not, of itself, sufficient to charge an endorser with notice. *Ib.*

32. The declarations of one who is in possession of property either real or personal, explanatory of his possession, are admissible evidence as part of the *res gestæ.*—*Fontaine & Dent* v. *Beers & Smith,* 722

33. When evidence, a part of which is legal, is objected to as a whole, the court is not bound to separate the legal from the illegal part of it, but the motion to exclude may be refused. *Ib.*

34. On the trial of the right of property in a vessel, on which an attachment had been levied, and a claim interposed under the statute, the plaintiffs may prove directions given to the captain of the vessel by the defendant in attachment, before the levy, under which the former acted. *Ib.*

35. But directions given to the captain by the defendant subsequent to the levy and interposition of the claim are irrelevant and inadmissible. *Ib.*

36. Whether such subsequent directions would be irrelevant, when offered in connection with proof that the claimants held a lien merely for their indemnity, which lien had been discharged by the defendant after the claim had been interposed. QUERE? *Ib.*

37. The declarations or admissions of the defendant, made while in possession of the brig before the levy, in disparagement of his title or interest, are admissible evidence. *Ib.*

38. When the parties proceed to trial upon an issue whether "the brig levied on was, at the date of the levy, subject to the attachment," a bill of sale bearing date after the levy is *prima facie* irrelevant, as being outside of the issue. *Ib.*

EXCEPTIONS, BILL OF.

1. When the record contains no bill of exceptions, but only an agreement purporting to have been made between the Solicitor and the counsel for the defendant, that the bill of exceptions taken in another case should be regarded as having been taken in the case at bar, and the minute entry does not show that the agreement was acknowledged by the parties in the Circuit Court, or made part of the record by an order of that court, the appellate court will reject the agreement.—*Cobb* v. *The State,* 18

2. When the court refuses to give a charge requested, the party wishing to revise such refusal, must set out in the bill of exceptions so much of the evidence as will show that the charge requested was pertinent to the evidence, and was not abstract.—*Leverett's Heirs* v. *Carlisle, Ex'r,* 80

3. When the bill of exceptions states that "the defendant then read a transcript in the words and figures following," but the transcript is not set out, and the clerk certifies that it is not on file in his office, a transcript which is afterwards sent up on *certiorari,* and which

EXCEPTIONS, BILL OF—CONTINUED.

cannot be identified by any reference to it in the original record, must be rejected as forming no part of the bill of exceptions.—*Br. Bank at Decatur* v. *Moseley*, 222

4. When the court below charges the jury that if they believe the evidence they must find for the plaintiff, the defendant seeking to revise the charge must either show that there was *conflicting* evidence before the jury, and that therefore the charge of the court invaded their province, or he must set out *all the evidence* in the record, that the Appellate Court may be able to determine whether the charge is sustained or authorized by it.—*Gaines* v. *Harvin*, 491

5. A recital in the bill of exceptions that the defendant offered evidence to which "the plaintiff objected, but his objection was overruled and plaintiff excepted," sufficiently shows that the evidence was actually given to the jury.—*Yarbrough* v. *Hudson*, 653

6. When the bill of exceptions does not purport to set out all the evidence, the appellate court will presume, against the party excepting, that an affirmative charge was sustained by the evidence.—*Jones* v. *Stewart*, 701

EXECUTION, WRIT OF.

1. A constable who has levied executions on personal property, while they are in force, may sell after the return day of the writs; and his receipt of the money upon a sale, and a failure to pay it over according to law, will subject his securities to liability therefor.—*Dennis & Strickland* v. *Chapman, Gov'r, &c.* 29

2. When an execution has been levied on property and bond given to try the right thereto in conformity with the statute, a second levy under a junior execution cannot be made on the same property before the claim is disposed of.—*McLemore, Adm'r*, v. *Benbow*, 76

3. In such case, the court will on motion set aside the second levy, even before the return of the execution. *Ib.*

4. The Act of 1848, (Pamphlet Acts, p. 95,) repeals the Act of 1845, (Pamphlet Acts, p. 62,) in reference to motions against officers for failing to return executions, and three days notice of the motion must now be given before judgment can be rendered against the officers for such default.—*Huggins et al.* v. *Powell*, 129

5. The Act of 1848 authorizes a judgment against an officer for failing to return an execution, of only twenty per cent. on the amount of the execution. *Ib.*

6. An execution which is issued by a Justice of the Peace, after the lapse of ten years from the issuance of the last previous execution, is not sufficiently regular to authorize a sale of the land on which it may be levied for want of personal property.—*Brown* v. *Higginbottom, use &c.* 207

7. Parol evidence is inadmissible to prove an execution, unless its loss or destruction is first proved, or its absence accounted for, or a transcript of the record containing it produced.—*Smelser* v. *Drane*, 245

8. Husband and wife conveyed certain personal property to a trustee, in trust for themselves during their joint lives, and then for the sur-

EXECUTION, WRIT OF—CONTINUED.

vivor of them during his or her life, after the death of the survivor for L. during his life, and then for his next of kin. The husband afterwards conveyed his entire interest in the property to L., who afterwards conveyed his entire interest to the trustee, "to and for the only use and benefit" of the wife--*Held*,

That the husband had no such interest in the property, as could be sold under execution against him.—*Cuthbert* v. *Wolfe*, 374

9. The Circuit Court has jurisdiction to render judgment under the act of 1840, against an officer for a failure to return an execution to the Supreme Court, although the amount of the judgment may be less than fifty dollars.—*Huggins* v. *Ball, Clerk, &c.* 587

10. An equitable title to land cannot be sold under execution at law, but resort must be had to a court of equity.—*Wilson* v. *Beard*, 629

11. The interest of the mortgagor, while in possession of the property before the law day has arrived, is subject to levy; but when the mortgagee becomes entitled to the possession, upon default being made, he may claim the property, and terminate the sheriff's possession.—*Fontaine & Dent* v. *Beers & Smith*, 723

12. But if the mortgagor discharges the lien by paying the mortgage debt before the trial of the claim suit, the assertion of his intervening claim by the mortgagee cannot prevent a condemnation of the property. *Ib.*

13. When the mortgagor of personal property remains in the actual possession of the property before the law day, *his entire interest therein*, consisting of the usufruct of the property until the law day and the equity of redemption, may be sold under execution at law against him.—*Harbinson et als* v. *Harrell et als.* 753

EXECUTORS AND ADMINISTRATORS.

1. An administrator who has paid money through mistake, to the administrator *de bonis non* who succeeds him, cannot recover it in assumpsit from a successive administrator *de bonis non*.—*Weeks* v. *Love, adm'r*, 25

2. When the testator is bound to protect his executor, or administrator, from all liability on a note, the executor, or administrator will be allowed to retain, out of the assets which come into his hands, the amount which he has paid on the note.—*Milam, adm'r*, v. *Ragland*, 85

3. When a testator a short time before his death, in the presence of his executor, or administrator, hands money to a third person to be taken care of, and at his death there is no money on hand, it is the duty of the executor or administrator to show what has become of it, and in the absence of any explanation on his part, he will be charged with the amount, on final settlement. *Ib.*

4. An administrator is chargeable on final settlement with money received by him after his removal from office, from an attorney who had collected it on debts of the estate, which had been placed in his hands for collection by the administrator before his removal.—*Sloan* v. *McKinney, adm'r*, 115

5. When an administrator acquires real estates by purchase from the

EXECUTORS AND ADMINISTRATORS--CONTINUED.

heirs of his intestate, it cannot be regarded in a court of law as assets in his hands.—*Coster* v. *Brack, adm'r,* 210

6. A decree of the Orphans' Court against an administrator, in favor of the distributees, is conclusive on him and his securities, and it cannot be impeached on the ground that the parties in whose favor the decree was rendered, are not distributees.—*Lamkin et al.* v. *Heyer et al.* 228

7. When a plaintiff styles himself executor or administrator, and declares on a note payable to himself in that capacity, but the declaration does not aver that the note is assets of the estate, the words executor, &c., are a mere *descriptio personæ,* and on the death of the plaintiff the suit is properly revived in the name of his personal representative.—*Arrington* v. *Hair, adm'r,* 243

8. Guardians, executors and administrators, who enter into a joint bond for the faithful performance of their duties, are liable for the acts and defaults of each other, *unless the bond itself shows,* that they did not intend to become bound for each other's defaults.—*Williams & Wife* v. *Harrison, Guard'n, &c.* 277

9. Prior to the Act of 1846 a suit might be maintained by the distributees of an estate against the executor after his removal from office, to make him account for the assets that had come to his hands.—*Gould* v. *Hayes et als.* 438

10. Reasonable compensation will not be refused to executors and administrators, except in cases of wilful default or gross negligence, by which loss to the estate has been occasioned.—*Ib.* 439

11. When a testator directs his estate to be kept together for distribution at a future period, the executor, if his conduct entitles him to any compensation, has a right to insist upon annual compensation, under the Act of 1841, (Clay's Digest, 228, § 39,) instead of commissions on the amount of receipts and disbursements; and in ascertaining that compensation regard must be had "to the amount of labor performed, the responsibility involved, and the value of the estate." *Ib.*

12. But for services performed previously to the passage of the act of 1841, an executor's compensation must be determined by the then existing law. *Ib.*

13. The mere failure to make annual returns will not deprive an executor of his right to compensation, when he has not been guilty of any gross neglect of duty. *Ib.*

14. The statutes of this State have changed the common law with respect to the rights of executors, and an executor here is not entitled to exercise any power as such, until he has been duly qualified in the manner pointed out by the statutes.—*Gardner et al.* v. *Gantt et al.* 666

15. Hence, if an executor assents to a legacy before letters testamentary have issued to him, his assent will not pass the legal title, nor bind the estate which he represents. *Ib.*

FORFEITURE.

See CORPORATIONS, 1, 2, 3, 4.

FRAUDS, STATUTE OF.

1. A promise made by the surety on a replevy bond, executed for the forthcoming of property levied on under attachment, to the plaintiff in attachment, that if he will dismiss the suit, he, the surety, will pay the debt, is an original undertaking, and is not within the statute of frauds.—*Blount* v. *Hawkins*, 100
2. The statute of frauds in this State does not apply to property brought into the State by a tenant for life holding under a deed or will executed beyond the State, although the tenant for life and the remainder-men resided in this State at the time of the execution of the deed, or probate of the will, and continue to reside here.—*Turner* v. *Fenner et als.*, 355
3. A court of equity will decree the specific execution of a parol agreement to sell or convey land, notwithstanding the statute of frauds, when there has been such a part performance of the agreement that to refuse it would work a fraud on the party seeking its specific execution.—*Brewer* v. *Brewer & Logan*, 481
4. A vendee who has obtained the possession of land under a parol contract and in pursuance of its terms, and has paid the entire purchase money, is entitled in a court of equity to a specific execution of the contract.—*Ib.* 482
5. T., being in possession of a quarter section of land to which he had a pre-emption right, agreed by parol with G. that G. should pay the whole of the entrance money to the government, and in consideration thereof should have one-half of the land. G. paid the entrance money accordingly, and took a patent in his own name. *Held*—That these facts were tantamount to the payment of the purchase money, and entitled T. to a specific execution of the contract. *Ib.*

GAMING.

See Criminal Law, 13, 14, 15, 26, 27.

GARNISHMENT.

1. When a garnishee comes into a court of chancery to be relieved against a judgment at law, which has been rendered against him by default, he should show by his bill, not only that he is not indebted to the defendant in attachment, but also that he has no effects in his hands belonging to said defendant.—*Hair & Labuzan* v. *Lowe*, 224
2. When a judgment has been rendered by default against a garnishee, and the evidence clearly shows that the failure to defend at law is attributable to his own neglect, he cannot be relieved in equity against the judgment. *Ib.*
3. A judgment final against a garnishee who has not answered, and against whom no judgment *nisi* has previously been taken, though irregular and erroneous, is not void, and is admissible evidence for the garnishee in a subsequent action against him instituted in the name of the defendant in attachment for the use of a third person to whom the debt was assigned after the rendition of the judgment.—*Gildersleve* v. *Caraway, use*, &c., 246

GARNISHMENT—CONTINUED.

4. When suit is brought on a promissory note, in the name of the payee for the use of his assignee against the maker, the latter cannot defend himself by showing that before the assignment of the note sued on, he was surety for the payee on a note to the Bank, that the payee became and continued to be insolvent, and that afterwards on account of the payee's insolvency, he had been compelled to pay the Bank debt, unless he also shows that such payment was made before the transfer of the note sued on, and notice thereof. *Ib.*

GUARDIAN AND WARD.

1. A final settlement made by a guardian with the Orphans' Court, in which a balance is found to be due from him to his ward, is evidence against him of a debt for the amount of that balance due from him to his ward, although as a judgment, the settlement would be considered void, because not rendered in favor of any one, and no execution could issue upon it.—*Hughes* v. *Mitchell*, 268
2. A guardian who has notice of a debt due to his ward, and makes no attempt to collect it, is chargeable on final settlement with the amount of the debt, if it is lost through his negligence. *Ib.*
3. When property of the guardian is sold under execution issued on a final decree rendered against him by the Orphans' Court, and the sale is afterwards set aside, and the execution quashed on account of the reversal of the decree by the Supreme Court, the guardian is not entitled on another final settlement, to a credit for the amount for which the property sold, or any part thereof. The title to the property, if ever divested at all, being restored to him when the sale is set aside, the presumption arises in the absence of all proof to the contrary, that he has regained the possession of it, or at least that its value has not been lost to him. *Ib.*
4. When a guardian is charged with a particular sum which has been litigated, he is also properly chargeable with the costs attending the litigation of it. *Ib.*
5. Guardians, executors and administrators, who enter into a joint bond for the faithful performance of their duties, are liable for the acts and defaults of each other, unless the bond itself shows, that they did not intend to become bound for each other's defaults.—*Williams & Wife* v. *Harrison, Guardian, &c.*, 277
6. The Orphans' Court has jurisdiction to compel guardians who have given a joint bond to account for each other's defaults. *Ib.*
7. *It seems*, that the Orphans' Court may render a joint decree against joint executors, administrators or guardians, when they are jointly liable for the acts of each other. *Ib.*
8. When guardians have given a joint bond, and one of them dies insolvent, the surviving guardian may be directly charged in the Orphans' Court, not only with his own defaults, but also with those of the deceased guardian. *Ib.*
9. When two guardians have given a joint bond, one is not liable for a default committed by the other, while sole guardian, before the execution of their joint bond. *Ib.*

GUARDIAN AND WARD—CONTINUED.

10. When money is shown to have come to the hands of a guardian at a particular time, and there is no evidence whatever that any disposition had been made of it, it is the province of the jury to decide whether it continued in her possession until a particular time afterwards. *Ib.*

11. But when a guardian is shown to have received money at a certain time, and there is also evidence tending to show that she had used it prior to a certain subsequent time, the presumption that it continued in her possession until such subsequent time cannot be drawn, either by the court, or by the jury, for the purpose of charging a surety with it. *Ib.*

12. A guardian, who has acted as such for only seven months, will not be charged with the amount of a debt due from a preceding guardian, on the ground of neglect in not having collected it, when it is shown that the sureties of the former guardian, who are bound for it, are entirely solvent. *Ib.*

13. A petition filed by a ward against his guardian's administrator, asking a settlement of his guardianship accounts, is demurrable, when it shows on its face that the guardian's estate has previously been settled as an insolvent estate.—*Patterson* v. *Leachman*, 745

HABEAS CORPUS.

See BAIL.

HUSBAND AND WIFE.

1. A Joint Resolution of the General Assembly of the State, by which a married woman is authorized "to take, receive and hold, by gift, purchase or inheritance, any property, real or personal, free from the molestation, hindrance or authority of her husband, and free from any liability to pay his debts or contracts, and the same to dispose of, by will, gift or sale, in the same manner as if she were a *feme sole*," does not subject her to be sued at law, upon any contract entered into for the purchase of property.—*Hatton* v. *Weir*, 127

2. *It seems* that the remedy of her creditor is by bill in equity, to subject her separate estate to the payment of his debt. *Ib.*

3. The laws of the State in which a marriage is celebrated govern the rights of each party to the property of the other, and their subsequent removal to another State only affects the property afterwards acquired.—*Doss et al.* v. *Campbell*, 590

4. Therefore, when a marriage was celebrated in Texas, by the laws of which the husband acquires no interest in his wife's property by the marriage, the subsequent removal of the parties with their property to this State does not subject the wife's property to the husband's debts. *Ib.*

5. A *feme covert* cannot sue at law by her next friend.—*Jordan* v. *Gray*, 618

6. When a declaration discloses that a *sole* plaintiff is a *feme covert*, a demurrer will lie to it. *Ib*

7. The Act of 1848, (Pamphlet Acts, 63,) "securing to married women

HUSBAND AND WIFE—CONTINUED.

their separate estates," &c., does not affect the husband's right to reduce to possession his wife's choses in action, which vested in him on his marriage prior to the passage of the act.—*Kidd* v. *Montague*, 619

8. A decree of the Orphans' Court in favor of husband and wife for the wife's distributive share of an estate, cannot be amended at a subsequent term *nunc pro tunc*, in favor of husband and wife for the separate use of the wife, when the record does not disclose the name of the wife, and show that her interest in the estate accrued after the passage of the Act of 1848. *Ib.*

9. To charge the husband, under the act of 1846, with the debts of his wife contracted *dum sola*, it must be shown that he has received property in right of his wife before the commencement of the suit; and a recovery can only be had against him to the amount of the property so received before the commencement of the suit.—*Curry* & *Groce* v. *Shrader* & *Wife*, 831

10. What is the creditor's remedy to obtain a judicial recognition of his debt contracted by the wife *dum sola*, when the husband has not received any property in right of his wife—QUERE? *Ib.*

INDICTMENT.

1. When it is alleged in the commencement of an indictment that "the grand jurors for the State of Alabama upon their oaths present," &c. and the name of the proper county is stated in the caption, the proceedings are sufficiently certain, although it is not averred in the indictment that such grand jurors were selected, empannelled, sworn and charged to inquire for the body of the county.—*Morgan* v. *The State*, 556

2. An objection to the formation of the grand jury cannot be raised for the first time in the appellate court. *Ib.*

3. The addition of the county of the defendant's residence is mere matter of form, and the failure to aver it does not affect the validity of an indictment. *Ib.*

4. An indictment for selling spirituous liquors to a slave, which alleges that the defendant sold "to one Henry, a slave, the property of one M. H., a certain commodity, to-wit, one gallon of whiskey, without the consent of the master, owner or overseer of said slave, either verbally or in writing, expressing the article permitted to be sold, being first had and obtained," is good under the Act of 1850, (Pamphlet Acts, 1849-50, p. 49.)—*Lindsay* v. *The State*, 560

5. An indictment for selling whiskey to a slave cannot be supported by proof of the sale of any other kind of liquor, although the liquor specified is laid under a *videlicet*. *Ib.*

6. An indictment under the fifth section of the act of 1850, (Pamphlet Acts, p. 11,) for keeping a hotel without license, which alleges that the defendant "did keep," &c., is demurrable. It should allege that he "was engaged in the business of keeping," &c.—*Pettibone* v. *State*, 586

See CRIMINAL LAW.

INSOLVENT ESTATES.

1. When the settlement of an insolvent estate is pending in the Chancery Court, and a final decree has been rendered in favor of the creditors against the administrators, and a balance is found in the hands of the administrators after satisfying all claims against the estate, a distributee of the estate may propound his interest to the court by petition, praying to be made a party to the cause, and for a decree against the administrators in his favor, for his distributive share of the balance in their hands to be distributed.---*Purdom & McBroom, Adm'rs*, v. *McBroom*, 110
2. But it is erroneous to render a final decree, in such a case, in favor of a distributee, against the administrators, without giving them notice of the filing of the petition, and thus allowing them an opportunity to contest the petitioner's claim.---*Ib.* 111
3. When the record of the Orphans' Court contains no report or decree of insolvency, a mere recital in the order of publication against creditors, that the estate had therefore been reported and declared insolvent, does not give the court of chancery, to which the cause has been transferred, jurisdiction to proceed to a settlement of the estate as an insolvent estate.—*McBroom's Adm'rs.* v. *McBroom's Creditors*, 173
4. Whether a partnership creditor can participate in the administration of an insolvent estate, when the surviving partners are solvent, QUERE?—*Emanuel* v. *Bird, Adm'r.*, 597
5. When a claim against an insolvent estate has been rejected by the Judge of the Orphans' Court, the claim cannot be re-investigated by the succeeding Judge of Probate, if any of the creditors object.—*Saltmarsh* v. *Bird, Adm'r.*, 665
6. The refusal of a Judge of Probate to admit a person claiming to be a creditor of an insolvent estate, to renew the litigation after a final judgment rejecting his claim, is not such a judgment as will authorize a writ of error. *Ib.*
7. A petition filed by a ward against his guardian's administrator, asking a settlement of his guardianship accounts, is demurrable, when it shows on its face that the guardian's estate has previously been settled as an insolvent estate.—*Patterson* v. *Leachman*, 745

See PARTNERSHIP, 1, 4, 5.

INTEREST.

1. When a bill is filed by the creditors of a rail road company against its debtors, for the purpose of subjecting the money in their hands to the payment of the debts due the complainants, and such debtors do not offer to bring the money into court, but engage in a protracted litigation respecting it, and insist upon their right to retain it, both as against the complainants and the company, they are properly chargeable with interest upon the balance found to be due from them to the company.—*Godwin et als.* v. *McGehee et als.*, 468
2. In general, a court will not decree interest on a balance unless it is specially asked for in the bill, but this rule applies only to interest due at the time the bill is filed. When the interest accrues subse-

INTEREST—CONTINUED.

quently, it is the practice of the court, upon further directions, to order that the interest be computed, although there is no prayer in the bill to that effect. *Ib.*

JUDGMENTS AND DECREES.

1. An order setting aside a judgment and granting a new trial, "upon the payment of all costs," does not vacate the judgment; and if the costs are not paid, a subsequent judgment, "that the order is therefore discharged and the plaintiff permitted to proceed upon the previous judgment as if no such order had been made," merely gives the previous judgment its full effect.—*Willis & Co.* v. *The Planters' & Merchants' Bank of Mobile,* 141
2. Judgments rendered in the Circuit Court of the United States create a lien on the lands of the defendant within this State, co-extensive with the lien of judgments rendered in the State Courts.—*Pollard* v. *Cocke,* 188
3. A decree of the Orphans' Court which does not designate the person or persons, in whose favor it is rendered, is void for uncertainty.—*Turner, Adm'r.* v. *Dupree's Adm'r.,* 198
4. A decree of the Orphans' Court against an administrator, in favor of the distributees, is conclusive on him and his securities, and it cannot be impeached on the ground that the parties in whose favor the decree was rendered, are not distributees.—*Lamkin et al.* v. *Heyer et al.* 228
5. A final settlement made by a guardian with the Orphans' Court, in which a balance is found to be due from him to his ward, is evidence against him of a debt for the amount of that balance due from him to his ward, although as a judgment, the settlement would be considered void, because not rendered in favor of any one, and no execution could issue upon it.—*Hughes* v. *Mitchell,* 268
6. A record can only be amended by some matter of record.—*Metcalf* v. *Metcalf,* 319
7. A memorandum in the hand writing of the Judge of Probate on the trial docket of his court, in the following words, viz: "J. M. heir of A. M. v. Administrators; Ordered to appoint Auditors, (naming them; Ordered that they report *instanter;* Auditors report in administrator's hands, $469 82,"—is insufficient to authorize the court to render a decree *nunc pro tunc* at a subsequent term, against the administrators in favor of J. M. for the amount thus ascertained. *Ib.*
8. A decree of the Orphans' Court, in favor of husband and wife for the wife's distributive share of an estate, cannot be amended at a subsequent term *nunc pro tunc,* in favor of husband and wife for the separate use of the wife, when the record does not disclose the name of the wife, and show that her interest in the estate accrued after the passage of the Act of 1848.—*Kidd* v. *Montague,* 619
9. A judgment cannot be amended *nunc pro tunc,* at a subsequent term, unless there is some matter of record to amend by.—*Saltmarsh* v. *Bird, Adm'r,* 665
10. The refusal of a Judge of Probate to admit a person claiming to be

JUDGMENTS AND DECREES—CONTINUED.

a creditor of an insolvent estate, to renew the litigation after a final judgment rejecting his claim, is not such a judgment as will authorize a writ of error. *Ib.*

11. In an admiralty proceeding by libel against a steamboat, after the vessel has been sold under an order of court, and the proceeds of the sale brought into court for distribution, the refusal of the court to order the proceeds to be paid to the claimant of the boat is not such a final judgment as will authorize an appeal or writ of error.—*Stewart George* v. *Saunders et als.* 744

JURISDICTION.

1. Consent of parties cannot confer jurisdiction, when the law excludes it.—*Winn* v. *Freele,* 171
2. The Orphans' Court has jurisdiction to compel guardians who have given a joint bond to account for each other's defaults.—*Williams & Wife* v. *Harrison, Guardian, &c.,* 277
3. When two courts have concurrent jurisdiction, that which first takes cognizance of a cause has a right to retain it, to the exclusion of the other.—*Gould* v. *Hayes et al.,* 438
4. The jurisdiction of the superior courts cannot be taken away by mere implication.—*The State* v. *Moore & Ligon,* 514
5. The Circuit Court has jurisdiction to render judgment under the act of 1840, against an officer for a failure to return an execution to the Supreme Court, although the amount of the judgment may be less than fifty dollars.—*Huggins* v. *Ball, Clerk, &c.* 587

JUSTICES OF THE PEACE.

See APPEALS FROM JUSTICES AND CERTIORARI.

LEASE.

1. In an action on a lease for years to recover the rent thereby reserved it is not necessary to aver in the declaration that the defendant entered upon or took possession of the premises.—*Douglass & Easton* v. *The Branch Bank at Mobile,* 659
2. A stranger cannot sue upon a deed which only contains covenants between the parties, although it may contain an express covenant for his benefit. *Ib.*
3. The Bank may sue in its own name on a lease of its real estate, when by the terms of the lease the rent is reserved to it, although the demise is in the name of the assistant commissioner. *Ib.*

LEX LOCI.

1. The law of the owner's domicil must in all cases determine the validity of every transfer or other disposition of personal property by the owner, whether it be *inter vivos* or *post mortem,* unless there is some positive or customary law of the country where it is situate providing for special cases, or from the nature of the particular property it has a necessarily implied locality.—*Turner* v. *Feaner et als.* 355
2. The law of the place of the parties' actual domicil must govern in

LEX LOCI—CONTINUED.

all questions of divorce, without regard to the law of the place where the marriage was celebrated.—*Harrison* v. *Harrison et als.* 499

3. A decree of divorce regularly rendered by the proper tribunal in this State is not invalid because the laws of the State in which the marriage was celebrated do not allow a divorce *a vinculo matrimonii.* *Ib.*

4. The laws of the State in which a marriage is celebrated govern the rights of each party to the property of the other, and their subsequent removal to another State only affects property afterwards acquired.—*Doss et al.* v. *Campbell,* 590

5. Therefore, where a marriage was celebrated in Texas, by the laws of which the husband acquires no interest in his wife's property by the marriage, the subsequent removal of the parties with their property to this State does not subject the wife's property to the husband's debts. *Ib.*

LIBEL.

See COUNTY TREASURER, 1.

LIMITATIONS, STATUTE OF.

1. A general admission of unsettled matters of account is not sufficient to take any particular account out of the statute of limitation, unless it is shown that the admission was made in reference to it.—*Boxley* v. *Gayle,* 151

MALICIOUS PROSECUTION.

1. R and L. were arrested under a warrant issued by a justice of the peace, charging them with having unlawfully taken the prosecutor's daughter from his premises, and detaining her against her will and consent, with intent to carry her out of the State. After the termination of the prosecution, R. brought an action against the prosecutor for a malicious prosecution. To rebut the presumption of malice, the defendant proved his own declarations, made after the abduction of his daughter, but before the issuance of the warrant, expressing his willingness that L. might marry his daughter. *It was held,*

   1. That the plaintiff might prove that these declarations were communicated to L., although the defendant was not present when the communication was made.

   2. That the plaintiff might also prove, that L. did not detain the young lady against her will and consent.

   3. That the plaintiff might also prove, that at the time of the institution of the prosecution, the defendant entertained unfriendly feelings towards the family of which the plaintiff was a member.—*Long* v. *Rodgers,* 321

2. To sustain an action for a malicious prosecution, there must be malice as well as a want of probable cause.—*Ib.* 322

3. There may be facts and circumstances which do not amount to probable cause, but which, being evidence of a want of malice, may justify the acquittal of the defendant upon the ground that there was an entire absence of malice. *Ib.*

MALICIOUS PROSECUTION---CONTINUED.

4. So on the other hand, an entire absence of actual malice may consist with the absence of every reasonable ground for a belief of the party's guilt; still, in such case the law implies malice, because there is no proof to extenuate the prosecutor's act which has been rashly and indiscreetly done. *Ib.*

5. Although the defendant honestly believed that the plaintiff was guilty of the offence charged, and acted upon such honest conviction, yet if there was a want of probable cause, such belief would not excuse him, unless it was founded on facts and circumstances which would create such a belief in the minds of honest and reasonable men. *Ib.*

6. If no probable cause in fact existed, and the defendant failed to use such precaution as a prudent man would use to ascertain that fact, although he acted entirely without malice, yet in such case malice will be inferred from the want of probable cause. *Ib.*

7. In an action on the case for a malicious prosecution, the judgment of the justice ordering the commitment of the plaintiff is evidence, and in the absence of countervailing proof, sufficient evidence of the existence of probable cause, but the plaintiff is not thereby concluded from introducing proof to show that the prosecution was without probable cause and malicious.—*Ewing* v. *Sanford*, 605

8. An action on the case for a malicious prosecution may be maintained, although the warrant for the party's arrest does not describe the offence with which he was charged, and the affidavit, warrant for commitment and recognizance misdescribe it.—*Ib.* 606

9. When the facts are ascertained and undisputed, the question whether they constituted probable cause is a pure question of law, which it would be erroneous for the court to refer to the jury; but where the facts are to be ascertained by the jury from evidence which is doubtful or conflicting, probable cause becomes a question for the jury. *Ib.*

10. A charge is erroneous which asserts, that if the facts establish a want of probable cause malice is a necessary implication independent of the circumstances in proof. *Ib.*

11. A count *in case* for a malicious prosecution must aver the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof.—*Sheppard* v. *Furniss*, 760

MANDAMUS.

1. Whether a *mandamus* from the Circuit Court would not lie, to require the Commissioners' Court to proceed and exercise its discretion, when the record shows that its action was not predicated upon the facts, as they might have been made to appear, but upon a supposed legal insufficiency of the petition, which induced the court to repudiate the application—QUERE?—*Brooks* v. *Kirby*, 72

2. The Commissioners' Court cannot be compelled, by *mandamus* from the Circuit Court, to make an appropriation for the payment of claims against the county, before they have been audited and allowed.—*Falkner* v. *The Judge & Comm'rs of Randolph County*, 177

MARRIED WOMEN, SEPARATE ESTATES OF.

1. An ante-nuptial contract was entered into between a woman and

MARRIED WOMEN, SEPARATE ESTATES OF—CONTINUED.

her intended husband, by which it was agreed, that after the marriage had been solemnized, a certain portion of the slaves and other property, which the wife had in possession and in remainder, should be settled and secured by some good and sufficient conveyance, upon a trustee for the use and behoof of the wife during the term of her natural life, with a provision in the settlement, that the property thus conveyed might be changed, sold and resold, or the whole trust annulled, whenever the husband and wife should jointly agree to do so. It was also thereby agreed, that the residue of the slaves which the wife had should be conveyed to the trustee for the use of the wife, until the husband should direct them to be sold, and when sold, the proceeds to be paid to the husband. *Held*,

1. That it was the manifest intention of the parties, that the wife should take a *separate* estate in that portion of the property which was to be conveyed to the trustee "for her use and benefit during the term of her natural life."
2. That the power given to the husband and wife, to annul the trust by their consent, does not subject the property to his debts.
3. That the husband, during his wife's life, does not take such an interest in the remainder, after the determination of her life estate, as is subject to levy and sale at law.---*Strong et al.* v. *Gregory*, 146

2. No particular language or form is necessary to create a separate estate in a married woman, either by deed or will, but the intention of the donor or testator must clearly appear.---*Cuthbert* v. *Wolfe*, 373
3. A conveyance of personal property to a trustee "to and for the only use and benefit" of a married woman, creates in her a separate estate. *Ib.*
4. An acknowledgment in writing by a married woman that an account for medical services, which is made out against her individually, is just and correct, is tantamount to an express promise in writing to pay, and creates a charge upon her separate estate.—*Collins et al.* v. *Rudolph*, 616
5. An ante-nuptial contract was entered into between B. and M., in the following language: "Whereas a marriage is about to be solemnized between B. and M., and the said M. is likely to bring into the marriage property of some value, and it being desirable that provision should be made for her maintenance and support, it is therefore agreed and stipulated, that the real estate and negroes which were devised to the said M. by her father, and all other property which she may otherwise hereafter inherit, shall be held and remain the separate and distinct property of the said M., not subject to any other disposition save by the joint consent of herself and one of the trustees hereinafter named. The said property, however, to be and remain in the possession of the said B., for the benefit of the parties. It is further stipulated, that said property shall descend and be inherited by the children of the said M., if she has any; but if none, or in case of their death before marriage or arriving at the age of twenty-one years, then said property to go to said B." Trustees are also

MARRIED WOMEN, SEPARATE ESTATES OF—CONTINUED.

appointed "for the said M. to protect her interest and to attend to the due execution" of the instrument; and by another provision, one of the trustees "shall have full power to sell and dispose of the real estate of said M. whenever he may see proper to do so, and appropriate the funds in such way as he may think best for her interest." *It was held*,

1. That the contract gives to the wife such a separate estate in the slaves conveyed by it, as entitles her exclusively to their labor and profits; and which cannot be defeated by her husband, or subjected to the payment of his debts.
2. The possession of the husband "for the benefit of the parties," must be construed to mean for the use of the wife during her life, and at her death, for those who might be entitled to the remainder according to the provisions of the deed.—*Petty et als.* v. *Boothe et als.* 633

6. The wife's separate estate is bound for the payment of a promissory note executed by her for goods, wares and merchandize furnished to her and her family.—*Collins et als.* v. *Lavenberg & Co.* 682

See HUSBAND AND WIFE, 1, 2, 7, 8.

MORTGAGES.

1. The purchaser of an equity of redemption, at a sale made by order of the Orphans' Court, is a necessary party to a bill which seeks a foreclosure of the mortgage.—*Hall et als.* v. *Huggins et als.* 200
2. All the mortgagees in whom is vested the legal title, are necessary parties to a bill to redeem, filed by the assignee of the equity of redemption.—*Woodward* v. *Wood*, 213
3. When a special authority is vested in one or more of the mortgagees for the benefit of all, all have an interest in the exercise of that authority, and a decree cannot be rendered affecting their interest unless they are all made parties to the bill. *Ib.*
4. If the mortgagee is only a trustee for another, the *cestui que trust* is a necessary party to a bill to redeem, unless some special reason is shown why he may be dispensed with. *Ib.*
5. When the principal debtor executes a mortgage to secure his sureties on a debt due to the Bank, the Bank is a necessary party to a bill to redeem filed by the assignee of the equity of redemption, unless the bill alleges that the debt has been paid. *Ib.*
6. When mortgaged lands have been sold under a decree of foreclosure rendered by the Chancery Court, and afterwards redeemed under the statute by the mortgagor, and a conveyance taken in the name of a trustee for the use and benefit of his wife, the mortgagor has not such an interest in the redeemed lands as can be the subject of a levy and sale under execution at law.—*Wilson* v. *Beard*, 629
7. The interest of the mortgagor, while in possession of the property before the law day has arrived, is subject to levy; but when the mortgagee becomes entitled to the possession, upon default being made, he may claim the property, and terminate the sheriff's possession.—*Fontaine & Dent* v. *Beers & Smith*, 723

MORTGAGES—CONTINUED.

8. But if the mortgagor discharges the lien by paying the mortgage debt before the trial of the claim suit, the assertion of his intervening claim by the mortgagee cannot prevent a condemnation of the property. *Ib.*

9. The statutes of this State requiring the registration of mortgages, deeds of trust, &c. on personal property do not apply to vessels for the navigation of the ocean. The evidence of title in them is to be looked for in their ship papers and registration according to the acts of Congress. *Ib.*

10. When the mortgagor of personal property remains in the actual possession of the property before the law day, *his entire interest therein*, consisting of the usufruct of the property until the law day and the equity of redemption, may be sold under execution at law against him.—*Harbinson et als.* v. *Harrell et als.* 753

11. The plaintiffs in execution are entitled to precedence over a stranger to whom, after the levy, the mortgagor has given an order on the mortgagee, which has been accepted by the latter, to be paid out of the surplus fund after satisfying the mortgage debt. *Ib.*

12. The lien of the plaintiffs in execution is not affected by a sale of the property made, by agreement between the mortgagor and the mortgagee, after the levy, and before the law day. In such case the plaintiffs would be entitled to recover the value of the hire of the property from the time of the sale until the law day, and to have an account taken of the value of the property on the law day. *Ib.*

13. When the mortgagees file a bill to separate their interest from that of the mortgagor, after the levy of an execution against the latter on the property, they cannot be allowed out of the mortgage fund reasonable solicitor's fees incurred by them in the prosecution of the suit. *Ib.*

14. A deed of mortgage may properly be admitted of record, on proof by the subscribing witness that he saw the same signed, sealed and delivered on the fourth day after its date. When it is not shown that any fraud was intended, nor that any injury was done, or attempted, by the wrong date, the probate will be held a substantial compliance with the statute, although it does not strictly accord with the form prescribed by it. *Ib.*

15. In taking an account of the mortgage fund after a sale of the property, the plaintiffs in execution cannot take advantage of usury in the mortgage debt. *Ib.*

NOTICE.

1. An endorser who is fully indemnified, or one for whose accommodation the note was drawn and who has received the benefit of it, is not entitled to notice of its non-payment.—*Holman* v. *Whiting*, 703

2. After the rendition of a judgment, the defendant is entitled to notice of a motion by the plaintiff for leave to substitute papers and file them as a part of the record of the cause.—*Murray & Durand, Ex'rs,* v. *Tardy*, 710

3. When a bill endorsed by a partnership is dishonored after a dissolution of the firm, notice of protest to any one of the late partners is sufficient to bind all.—*Coster, Robinson & Co.* v. *Thomason, use, &c.*, 717

NOTICE--CONTINUED.

4. A recital in the notary's certificate of protest, that "notice of the protest had been left at the offices of the endorsers," is not, of itself, sufficient to charge an endorser with notice. *Ib.*
5. When a will is admitted to probate without notice having been given to those who are entitled to notice, the probate will be set aside on their application to the court.—*Roy* v. *Segrist et als.* 810
6. In such case the party who was entitled to notice may propound his interest to the court by petition, and be made a party to the proceedings so as to sue out a writ of error. *Ib.*
7. The widow *and* next of kin of a decedent are entitled to notice of an application to admit his will to probate. The disjunctive conjunction "*or*," as used in the statute, (Clay's Dig. 303, § 34,) is a misprint for "*and*." *Ib.*

PARENT AND CHILD.

1. A father, who by reason of his poverty and bodily infirmity has become unable to support his infant daughter, has a right to resort to the court of equity which has appointed a trustee of her estate, to have an allowance for her support and education decreed to be paid by such trustee out of the annual income of her estate.—*Watts* v. *Steele, Trustee,* 656
2. When a father pays without objection an account contracted by his minor son while attending school at a distance from home, the payment is equivalent to a recognition of the son's authority to bind him, and will render him liable on a similar account subsequently contracted.—*McKenzie* v. *Stevens,* 691
3. When a pecuniary legacy, bequeathed to children who die during infancy leaving no issue, brothers or sisters, is received by their father after their death, his title is *prima facie* good, and requires no action of the court to settle it; and therefore the personal representative of the infants is not a necessary party to a bill filed by their father's administrator, asking the direction of the court in the construction of his will, the establishment of certain charitable bequests created by it, the marshalling of the assets, distribution of the estate, &c. *Carter & Wife et als.* v. *Balfour's Adm'r,* 814

PARTNERSHIP.

1. In equity partnership debts are considered joint and several, and the joint creditors have the right to proceed against the estate of a deceased partners, if the surviving partners are insolvent and there is no joint fund to which they may resort.--*Emanuel* v. *Bird, adm'r,* 596
2. In the administration of partnership assets partnership debts are entitled to priority over the individual debts of the partners. *Ib.*
3. In the administration of the separate estate of a deceased partner, his separate creditors are entitled to priority over the joint creditors, so long as there is a joint fund to which the latter may resort. *Ib.*
4. When the surviving partners are insolvent and there is no joint fund to which the partnership creditors may resort, they are entitled to share in the assets of the deceased partner *pari passu*, with his separate creditors. *Ib.*

PARTNERSHIP—CONTINUED.

5. Whether a partnership creditor can participate in the administration of an insolvent estate, when the surviving partners are solvent—QUERE?---*Ib.* 597
6. When a bill endorsed by a partnership is dishonored after a dissolution of the firm, notice of protest to any one of the late partners is sufficient to bind all.—*Coster, Robinson & Co.* v. *Thomason, use &c.* 717
7. A contract by which the plaintiff agreed to serve the defendant as an overseer for one year, to furnish a certain number of hands and horses which were to be worked on defendant's plantation with his hands and horses, to defray the expenses of himself, his hands and horses, and to receive one-fourth part of the crop raised as his compensation, does not make the parties partners *inter sese.*—*Moore* v. *Smith,* 774

PLEADING AND PRACTICE AT LAW.

1. If a writ issue against three defendants, which is served upon two of them only, and an *alias* is issued and served upon all, it is erroneous to render judgment by default against all of them, at the term to which the *alias* writ is returnable.--*Griffin, Rayfield & Griffin* v. *Wilson,* 27
2. If an attachment be issued without the bond and affidavit required by the statute, it can only be abated on the plea of the defendant.---*Kirkman & Rosser* v. *Patton,* 32
3. When a sheriff justifies under *mesne* process, after the time appointed for its return, he must either aver its return, or show some legal excuse why it was not returned.---*Kirksey, Trustee, &c.* v. *Dubose,* 43
4. It is erroneous to render judgment by default, before a declaration has been filed.---*Amason* v. *Nash et al.* 104
5. When there are several counts in the declaration, and a plea is pleaded to only a portion of them, a demurrer to such a plea may be visited upon the counts to which it relates ---*Henderson* v. *Hale,* 154
6. When the defendant, instead of demurring to a replication, takes issue upon it, he cannot test its legal sufficiency by a motion to exclude evidence, which tends to establish it.--*Coster v. Brack, adm'r,* 210
7. When the endorsement on a writ states that the suit is founded on a refunding bond given to the plaintiff as administrator, while the writ is in the name of the plaintiff individually, and the declaration agrees with the writ, there is not such a variance between the endorsement and the declaration, as will authorize the court to reject the latter.---*Smith et al.* v. *Wiley,* 216
8. When a cause has been transferred to the Circuit Court, under the act of February 11, 1850, (Pamphlet Acts, p. 34,) after the appearance term of the County Court, it is not erroneous to enter judgment by default at the first succeeding term of the Circuit Court.---*Falk & Rosenthal* v. *Reese, use &c.* 240
9. If two or more persons are bound jointly, but not severally, and one is sued alone, he can only take advantage of the non-joinder of the others by plea in abatement, and cannot insist on the omission under the general issue.---*Henderson* v. *Hammond,* 340
10. In debt on bond, the breaches assigned, whether in the declaration

PLEADING AND PRACTICE AT LAW—CONTINUED.

or by a replication, must show that the plaintiff has a cause of action.---*Garrett & Hill* v. *Logan*, 344

11. The character of a suit is determined by the declaration, and not by the plea.---*Lyon's Heirs* v. *Mottuse*, 463

12. A general order of continuance of all causes not otherwise disposed of, if made at the suggestion, or with the consent of the parties, or their counsel, would operate as a continuance entered in each case by consent, and would be a completion of the business of the court justifying its adjournment.---*Ex parte Croom & May*, 563

13. When the judgment entry recites that the jury after deliberating a reasonable time were unable to agree upon a verdict, that the court had disposed of the business before it, and that it was absolutely necessary that the term of the court should then be closed, the jury may properly be discharged and a mistrial entered.---*Powell* v. *The State*, 577

14. In debt on bond, a demurrer will not lie to a whole count which assigns several breaches, some of which are good.---*Wilson, use &c.* v. *Cantrell et als.* 642

15. A demurrer to a plea opens the previous pleadings and reaches back to the declaration.---*Chaudron* v. *Fitzpatrick, Gov'r, &c.* 649

16. An action of debt on a bond payable to the Governor for the time being and his successors in office cannot be maintained in the name of the obligee, as Governor, after he has gone out of office, unless the suit is brought for the use of a third person who may be responsible for the costs and entitled to the recovery. *Ib*

17. Under the statutes and rules of court regulating the action of ejectment in this State, a plaintiff may proceed for his costs and damages, after the premises have been recovered against him by an adversary plaintiff in another suit; consequently a plea *puis darrein continuance* of a recovery by a stranger is demurrable, if pleaded to the whole action, because it is no defence to the recovery of damages.---*Doe ex dem. Kennedy* v. *Holman & Howard*, 734

18. It is not error to permit the plaintiff to amend the endorsement on his writ, so that he may add special counts to his declaration.---*Moore* v. *Smith*, 774

PROBATE, COURT OF, AND ORPHANS' COURT.

1. In a proceeding under the statute before the Orphans' Court, to compel the administrator of a deceased vendor to make title to land, which had been sold by the deceased, and for which he had executed his title-bond, the administrator is the only indispensable party defendant to the petition, and he may sue out a writ of error alone to reverse a decree rendered against him.---*Prince, Adm'r*, v. *Bates*, 105

2. If the person holding the bond for title has sold a part of the land to a third person, the Orphans' Court is not thereby deprived of jurisdiction. *Ib.*

3. A decree of the Orphans' Court which does not designate the person or persons, in whose favor it is rendered, is void for uncertainty. *Turner, Adm'r*, v. *Dupree's Adm'r*, 198

4. A decree of the Orphans' Court against an administrator, in favor

PROBATE, COURT OF, AND ORPHANS' COURT--CONTINUED.

of the distributees, is conclusive on him and his securities, and it cannot be impeached on the ground that the parties in whose favor the decree was rendered, are not distributees.---*Lamkin et al.* v. *Heyer et al.* 228

5. A decree of the Orphans' Court, in favor of husband and wife for the wife's distributive share of an estate, cannot be amended at a subsequent term *nunc pro tunc*, in favor of husband and wife for the separate use of the wife, when the record does not disclose the name of the wife, and show that her interest in the estate accrued after the passage of the Act of 1848.---*Kidd* v. *Montague*, 619

See ERROR, 15, 16, 17.
ESTATES OF DECEASED PERSONS.
EXECUTORS AND ADMINISTRATORS.
GUARDIAN AND WARD.

REAL ACTIONS.

1. A writ of right at common law would lie only to recover a fee simple estate, and in favor of him who had the fee simple title.—*Lyon's Heirs* v. *Mottuse*, 463
2. A count which does not allege a seizin in fee simple, either in the demandant or in the ancestor through whom he claims, is defective as a count in a writ of right, although it alleges the disseizin of the demandant's ancestor. *Ib.*
3. But it is sufficient as a count in a writ of entry *sur disseizin*, especially after verdict, the gist of that action being the wrongful disseizin without regard to the mere right of property. *Ib.*
4. A count which alleges the disseizin of the demandant's ancestor, and which is insufficient as a count in a writ of right for want of an averment of seizin in fee, must be considered as a count in a writ of entry. *Ib.*

SALES, JUDICIAL.

1. The title of one who claims under a purchase at a sheriff's sale, made by virtue of a "*venditioni exponas*" from the Circuit Court, cannot be collaterally impeached, on account of the irregularities in the proceedings upon which the order of the Circuit Court is founded.—*Weir* v. *Clayton*, 132
2. An order of sale made by the Circuit Court, which recites the issuance of an execution by a Justice of the Peace of the county in which the lands lie, and its levy by a constable of that county, and also states the numbers of the land, is sufficient, although it does not designate by name the county or the district in which the lands lie. *Ib.*
3. The deed of a sheriff or marshal cannot be collaterally impeached on account of any irregularities in his proceedings, or in the process under which he sold the land.---*Pollard* v. *Cocke*, 188
4. When land is sold under an *alias* execution, and no objection to its regularity is made in the court below, it will be presumed that a previous execution was regularly issued. *Ib.*
5. If a deed is not registered within the six months prescribed by the statute, nor until after the rendition of a judgment against the vendor in favor of a creditor who had no notice of the deed, its subse-

SALES, JUDICIAL—CONTINUED.

quent registration cannot relate back so as to defeat or postpone the lien of the judgment. *Ib.*

6. A sale made in the Southern District of this State, by the United States Marshal of that District, of lands situated in the Middle District, is absolutely void; and his deed to the purchaser may be impeached collaterally.---*Ib.* 189

See ESTATES OF DECEASED PERSONS, 5.

SCIRE FACIAS.

1. A *scire facias* to revive a judgment, as to costs, against an administrator, the damages having been paid, is sufficient if it substantially describes the judgment, although it does not state the amount of the costs.---*Barron, Adm'r,* v. *Tart,* 78
2. A *scire facias* cannot revive a judgment on which no execution could ever have issued.---*Turner, Adm'r,* v. *Dupree's Adm'r,* 198

See CORPORATIONS, 1, 2, 3, 4.

SET-OFF.

1. Courts of equity put the same construction on the statutes of set-off, in the absence of all intervening equities, as do the courts of law.---*McKinley* v. *Winston,* 301
2. In an action to recover a debt due from the defendant to the plaintiff individually, the defendant cannot set-off a debt due from the plaintiff to a firm in which they are both partners. *Ib.*

SPANISH LAND TITLES.

See EJECTMENT, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

SPECIFIC EXECUTION.

See CHANCERY, 20, 21, 22, 23, 24, 25.

SUPERSEDEAS.

1. A *supersedeas* to restrain the execution of a writ of *habere facias possessionem* cannot be granted in vacation on the petition of a stranger to the judgment.—*Grant* v. *Kennedy,* 226
2. When issue is taken upon the facts stated in a petition for a *supersedeas,* neither the affidavits of the parties nor the depositions of incompetent witnesses are admissible.--*Bower et al.* v. *Saltmarsh,* 274
3. The defendant in a judgment has a full and complete remedy at law, by *supersedeas,* to obtain credit for a part payment of the judgment, and consequently such payment constitutes no ground for equitable relief.—*Perrine* v. *Carlisle,* 686

SURETIES.

1. The sureties of a justice of the peace on his official bond are only bound for the faithful performance of his ministerial duties, and not for errors, mistakes and omissions of a judicial character.--*McGrew & Beck* v. *The Governor, use,* &c., 89
2. The liability of the sureties of a county officer does not cease upon their application to the County Judge to require a new bond from the officer, but continues until the new bond is given, or until the office is declared vacant on account of the officer's failure to give it. —*Armstrong et al.* v. *Pugh,* 209
3. When lands are sold under an execution against the principal debt

SURETIES--CONTINUED.

or, and purchased by one of his sureties with money belonging to himself and another co-surety, a third co-surety cannot claim to participate in the benefit of the purchase as an indemnity against his liability with the other sureties.—*Crompton et als.* v. *Vasser, Ex'r.*, 259

TRESPASS.

1. Trespass is the onl[illegible]nedy for damage occasioned to the plaintiff by the malicious [illegible]e defendant in causing an execution issued against a third pe[illegible] levied on property belonging to the plaintiff.—*Tatum & Sm*[illegible] 302
2. The mere recovery o[illegible]nt against one of several joint trespassers will not preclude the [illegible] from proceeding to judgment against the o'hers.—*Blann* v. *Crocheron*, 647
3. Whether suing out execution on his judgment will be a bar to a subsequent suit against others. QUERE? *Ib.*

See ACTION ON THE CASE.

TROVER AND CONVERSION.

1. The recovery and satisfaction of a judgment in an action of trover, for the conversion of a slave, who was drowned while in the possession of the defendant under a contract of hiring, damages being assessed for her value at the time of the conversion, vests the title in the defendant from the time of the conversion, and hire cannot be recovered for the unexpired term.—*Smith, use, &c.* v. *Hooks et al.*, 101
2. In an action of trover for the conversion of a promissory note, the plaintiff may recover upon proof of his previous possession of the note, notwithstanding the legal title to it, and the right to sue for the money due thereby, are shown to be in another person. If the defendant would protect himself by showing an outstanding title in another, he must connect himself with it, by showing that he acted under the authority of the real owner.—*Lowremore* v. *Berry*, 130
3. Trover will not lie for the conversion of a promissory note, after it has been paid, or legally discharged in any manner. *Ib.*
4. But if the note has not been paid, or legally discharged, trover will lie for its conversion, although the word "paid" has been written across the face of it by mistake, or by one without authority. *Ib.*

TRUSTEES AND CESTUIS QUE TRUST.

1. A bill which seeks to enforce the execution of a trust in the name of a mere volunteer, and for his benefit, must allege a declaration of the trust in his favor.—*Crompton et als.* v. *Vasser, Ex'r*, 259
2. Courts of equity will not enforce, as in favor of a volunteer, a purely voluntary trust which is executory.—*Ib.* 260
3. But when a person has constituted himself a trustee for another, and the relation of trustee and *cestui que trust* has been fully established, the trust may be enforced in equity for the benefit of the *cestui que trust*, although he is a mere volunteer. *Ib.*
4. Expenses properly incurred by a trustee in the execution of his duties as such are a charge or lien upon the trust estate, and the *cestuis que trust*, or their assigns, cannot compel him to convey in equity until his demands against the estate are satisfied.—*Jones* v. *Dawson et als.*, 672
5. But persons who are employed by the trustee, in about the business of the trust property, must look to him personally for payment, and cannot proceed directly against the trust fund. *Ib.*

(DARGAN, C. J., dissented from the second point of this case, and adhered to the decision in Coopwood et al. v. Wallace, 12 Ala. 780.)

6. *Cestuis que trust* for life, who are in possession of the trust estate, are

TRUSTEES AND CESTUIS QUE TRUST—CONTINUED.

liable for all current expenses attending the enjoyment of the property, and such expenses constitute no charge upon the *corpus* of the trust. *Ib.*

7. When no provision is made in the deed for the resignation of the trustee therein appointed, there are but two ways in which a trustee can resign his trust after having once accepted, viz., in the summary manner pointed out in the statute. ([illegible] Dig. 581,) or by the permission of a Court of Chancery.—*Dr[illegible]nter*, 731

8. An instrument in writing executed by [illegible], purporting to be a resignation of his trust and a trans[illegible] trust estate to another person, as trustee, with the con[illegible] approbation of the *cestuis que trust*, creates no vacancy in [illegible] trusteeship until ratified by the court, when the deed confers no such power on the trustee. *Ib.*

9. When the objects of a trust are fully performed, the title of the trustee ceases, and the legal as well as the equitable title vests in the beneficial owner, unless the intention of the grantor that the legal title should continue in the trustee clearly appears.—*Comby et als.* v. *McMichael et als.*, 747

VENDOR AND VENDEE.

1. Although it is the duty of the vendor to disclose to the vendee such intrinsic defects in the property sold as materially affect its nature and condition, which lie especially in the knowledge of the seller, and which the purchaser cannot, by the exercise of proper diligence, discover, yet the law does not require him to disclose "the fullest extent of that unsoundness," by describing particularly the different stages and symptoms of the disease, and all the circumstances attending it.—*Armstrong* v. *Huffstutler, Adm'r., &c.*, 51

2. When the purchaser pays what would be an inadequate price if the animal purchased was sound, it is a circumstance to which the jury may look, in connection with other proof, in determining whether or not he was advised of the latent unsoundness of the animal, if there was any. *Ib.*

3. The fact that the deceased vendor assumed to sell the land and executed his bond for title, raises the presumption of ownership in him, and the *onus* of showing an outstanding title is cast on the adverse party —*Prince, Adm'r.* v. *Bates*, 105

4. If the person holding the bond for title has sold a part of the land to a third person, the Orphans' Court is not thereby deprived of jurisdiction. *Ib.*

5. When the purchaser of a slave sold at public auction pays the purchase money after he has been informed of the slave's unsoundness, and of facts which would constitute a fraud in the sale, he cannot afterwards recover damages in an action of deceit, on account of such unsoundness.—*Gilmer* v. *Ware*, 252

6. When a party purchases land in the possession of a third person, without inquiring into his rights or the character of his possession, he is affected with all the equitable rights binding on his vendor, and he cannot set up the want of notice to protect himself.—*Brewer* v. *Brewer & Logan*, 482

7. A written instrument is required to pass the title to a ship, as determining its national character; but as between vendor and purchaser, a parol sale, consummated by delivery, will be good to pass the title.—*Fontaine & Dent* v. *Beers & Smith*, 723

See STAUTTE OF FRAUDS, 3, 4, 5.
DEEDS, 11, 12.
BONDS, 9, 10, 11.

WILLS.

1. An instrument founded on a valuable consideration, in form a deed executed by both parties, and as such capable of full effect, and manifestly intended to convey a beneficial interest to the grantee, to take effect and be enjoyed in the grantor's life-time, must be regarded as a deed, and not as a will.—*Thompson et al.* v. *Johnson*, 59
2. The same instrument cannot operate both as a deed and as a will. *Ib.*
3. It is not necessary that the subscribing witnesses to a will should be informed of its contents.—*Leverett's Heirs* v *Carlisle. Ex'r.*, 80
4. To constitute undue influence, some act or acts must have been done to cause the testatrix to dispose of her property contrary to her desire. *Ib.*
5. When a will is admitted to probate without notice having been given to those who are entitled to notice, the probate will be set aside on their application to the court.—*Roy* v. *Segrist et als.*, 810
6. In such case the party who was entitled to notice may propound his interest to the court by petition, and be made a party to the proceedings so as to sue out a writ of error. *Ib.*
7. The widow *and* next of kin of a decedent are entitled to notice of an application to admit his will to probate. The disjunctive conjunction "or," as used in the statute, (Clay's Dig. 303, § 34,) is a misprint for "*and*." *Ib.*

See BEQUESTS TO CHARITALE SOCIETIES.

WITNESS.

1. The maker of a deed of trust may be made a competent witness to sustain it, by first showing his certificate of discharge under the Bankrupt act, obtained subsequently to the execution of the deed, and also his release to the assignee in bankruptcy, of all interest which he may have in the suit.—*Kirksey, Trustee, &c.* v. *Dubose*, 44
2. The act of 1845, which renders the defendant in execution an incompetent witness on a trial of the right of property under the statute, allowing a claim to be put in to property levied on, is in derogation of the common law, and will not be extended to the ordinary common law actions, or causes in equity, for the recovery of damages, or the specific property, in which the title may be put in issue. *Ib.*
3. A constable, who has collected money on an execution, is an incompetent witness, without a release, to prove that he has paid it over to the justice of the peace who issued the execution.—*McGrew & Beck* v. *The Governor, use, &c.*, 89
4. An agent is a competent witness for his principal to prove that he has paid over money left with him by his principal for that purpose.—*The Governor, use, &c.* v. *Gee et als.*, 199
5. A person whose interest in the event of a suit is precisely balanced is a competent witness. *Ib.*
6. A distributee of an estate may become a competent witness for the administrator by releasing to him his distributive share of the estate. —*Herndon* v. *Givens, Adm'r.*, 313
7. But he is not a competent witness to prove the execution of his own release. *Ib.*
8. A witness cannot be impeached by proof of contradictory statements previously made by him, whether oral or written, without first giving him an opportunity to explain such previous statements. —*Powell* v. *The State*, 577

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